

An aerial photograph of a massive crowd of people, seen from above, filling the entire frame. The individuals are densely packed, and their clothing creates a mosaic of various colors like blue, red, white, and black. The perspective is looking down from a high angle.

NOT CRIMINALS

Underpinning a health-led
approach to drug use



THE LONDON SCHOOL
OF ECONOMICS AND
POLITICAL SCIENCE ■

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FOREWORD

The goals of drug policy are increasingly clear, even if the mechanisms can be complicated or disputed. Today, there is an increasing consensus among experts and policy makers that drug policy should be aligned with public health goals – reducing serious harm and improving the health of people who have been, or still are, caught up with drug use. What were previously seen as worthy goals – such as completely eliminating non-prescribed use of drugs in a population – are now widely seen as unattainable and, importantly, are now recognised as sometimes inadvertently bringing extra harms and disadvantage to the very individuals they seek to help.

In this context, policy choices can become nuanced and complex. One such choice is around the criminalisation of individual behaviours related to drug use, such as that of possession for personal use. Do punitive responses to personal drug use make the situation better? Or worse? This is the question now facing policy makers in Ireland.

Although there are often challenges in rigorously analysing significant policy shifts, a considerable literature now exists in the area of punitive sanctions for personal drug use. The overall learning from this body of knowledge is that reducing sanctions on people who use drugs does not significantly influence consumption at a population level. Equally, we know that criminalisation has effects that go far beyond any simple deterrence of a behaviour. Periods of imprisonment can be actively damaging, and having a criminal record can affect people's ability to travel freely, to find work, to engage with society in general. In short, being criminalised is stigmatising. It affects both how others perceive you, and how you perceive yourself. In light of what we know, it is difficult to justify criminalising behaviours associated with personal drug use,

such as simple possession, as a valid policy choice. This is not to say that society should not be concerned with drug use – drug use can and does cause harm – merely that the criminal law as a tool to address personal drug use is a very blunt instrument with which to deal with a complex problem, and also one which can itself do damage. It is also at an extreme of policy choices and, like many extremes, its harms can very likely outweigh its benefits. Too often, discussions on drug use and drug policy become polarised towards such extremes when the reality is that the problem of drug use in society is not a simple problem which lends itself to simple solutions – the challenge for policy makers is to explore the middle ground and to identify the appropriate suite of policies that finds the balance between the need to control substances that can cause harm, while also protecting individual rights and ensuring that people who need help around their drug use are able to get that help easily, in a timely manner and without fear of judgment or the mark of stigma from their fellow citizens. This is not easy, but it is necessary.

I have followed with interest the drug policy choices in Ireland in recent years, and I am pleased to have been able to contribute to the evaluation of the previous National Drug Strategy. My observation of drug policy in Ireland is that it is recognised as an important policy area and accorded the weight it deserves. Equally, I have been consistently impressed with the contributions brought forward by civil society organisations such as the Ana Liffey Drug Project. This paper is another such contribution, co-authored with acknowledged academic experts affiliated with leading institutions. It is well-researched, balanced and cogent, and I am sure it will be of great benefit to the policy makers to whom it is directed.

Professor Sir John Strang

National Addiction Centre, King's College London,
U.K. September 2018

OVERVIEW

Currently, Ireland is at a pivotal point in drug policy. A working group has been established under the National Drugs Strategy to consider the approaches taken in other jurisdictions to the possession of small quantities of drugs for personal use with a view to making recommendations on policy options. This is an important issue, and the purpose of this paper is to ensure that there is a strong civil society contribution to what is a national policy discussion of significant importance, as well as providing an evidence source on the adoption of a health led approach to the possession of small amounts of drug for personal use in the Irish context. The focus of this paper is on the decriminalisation of simple possession only, which, it is important to stress, is a discrete issue and is distinct from broader policy debates concerning the legalisation or regulation of drug markets.

At an international level, the focus and mechanics of drug policy have shifted over time – from an initial focus on supply and trafficking through a concerted effort to use the criminal law to address personal drug use, to today where the evidence is leading to a changing policy environment where the harms of criminalisation are well understood, and alternative approaches are pursued. In 2015, in his message on International Day Against Drug Abuse and Illicit Trafficking, then United Nations (UN) Secretary General Ban Ki-Moon used his platform to call on UN member states to:

‘...consider alternatives to criminalization and incarceration of people who use drugs and focus criminal justice efforts to those involved in supply. We should increase the focus on public health, prevention, treatment and care, as well as on economic, social and cultural strategies’¹

Domestically, legislators have always emphasised the importance of the health of people who use drugs, and the harms of being prosecuted, even where one is acquitted, are well recognised by state agencies.² During the Oireachtas debates on our primary drug control legislation, the Misuse of Drugs Act 1977, it was clear that legislators saw personal drug use as something to be addressed through assistance, not punishment – the criminalising of simple possession was more an undesirable means to the desirable end of a drug-free society, rather than a desirable end in and of itself. As Deputy Haughey noted at the time:

“We have had to try, too, to bring in legislation that would render certain acts punishable but we have had to recognise that very often people committing these offences are not guilty of criminal activity in the normal sense but, perhaps, are people who require medical care and attention rather than punishment.”³

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- 1 Message on International Day Against Drug Abuse and Human Trafficking, "Press Releases, United Nations Information Services, published 26th June 2015, <http://www.unis.unvienna.org/unis/en/pressrels/2015/unissgsm645.html>
 - 2 Director of Public Prosecutions, *Guidelines for Prosecutors, 4th Ed.* – October 2016 (Dublin : Office of the Director of Public Prosecutions, 2016), 12, [https://www.dppireland.ie/filestore/documents/Guidelines_for_Prosecutors_\[4th_Edition_-_October_2016\].pdf](https://www.dppireland.ie/filestore/documents/Guidelines_for_Prosecutors_[4th_Edition_-_October_2016].pdf)
 - 3 Dáil Eireann debate, 31st March 1977, Misuse of Drugs Bill (1973); Fifth Stage, "Debates, Oireachtas Eireann, updated 11th March 2018, <http://oireachtas-debates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/takes/dail1977033100006>

Nonetheless, simple possession of substances scheduled under the Act was criminalised under section 3, and this continues to be the case today. Over the intervening years, regulations made pursuant to the primary legislation have also shaped the law on possession, as have various other statutes. The scope of the impact of the law in this area is considerable. In 2017, there were 12,201 recorded incidents of possession of drugs for personal use, representing over 72% of all drug offences.⁴ There are also high numbers of prosecutions with regard to drug related crime. The District Court received 20,746 drugs offences involving 13,033 defendants in 2016,⁵ although it should be noted that the available data does not detail the precise charges brought in each case.

The evidence base concerning drugs, drug use and drug control is much more developed now than it was in 1977. We know that the reasons for drug use are complex, and that there is no clear link between the harshness of a country's policy on possession of drugs for personal use and levels of drug use. Prevalence figures for drug use are not significantly affected by whether or not simple possession is criminalised – there is no consistent 'deterrent effect'. However, we do know that criminalising people is damaging. Words are important, and being labelled a criminal is stigmatising. The fact of being labelled a criminal can also have lasting negative impacts on people's lives, such as by restricting access to the employment market and affecting travel rights.

Given that criminalising simple possession provides little benefit but significant harm, it seems clear that it is not a good policy option. In this regard, it is worth noting that when Ireland's legislators enacted legislation to address novel psychoactive substances in 2010, simple possession was not criminalised. In our quest to limit access to, and control use of, substances not controlled under the 1977 Act, we did not need to criminalise possession for personal use. Thus, Ireland operates a dualist framework in relation to possession of drugs for personal use. Only possession of substances which are specifically scheduled under the Misuse of Drugs Act 1977 is a crime. Non-scheduled psychoactive substances fall to be considered under the Criminal Justice (Psychoactive Substances) Act 2010, and simple possession is not a crime under the 2010 Act.

A number of countries around the world have explicitly decriminalised possession of drugs for personal use. Evidence from these jurisdictions indicates that decriminalisation can, as part of a comprehensive policy approach, improve health and social outcomes for people who use drugs, something which is desired by all stakeholders. Importantly, decriminalisation also changes the way people who use drugs are perceived in society and is consistent with addressing drug use as a health issue, not a criminal justice issue. In this regard, it is important to remember that people who use drugs are not hard to find, or a tiny proportion of the population as a whole. Rather, they are our friends, family members and colleagues – over a quarter of Irish adults report having used illicit drugs at some point in their lives. Using the criminal law as the means of addressing their possession of drugs is not a solid policy approach, and this report unequivocally supports the decriminalisation of possession for personal use and the adoption of a health led approach focused on reducing harm.

4 "Recorded Crime Offences Under Reservation (Number by Type of Offence and Year," Statistics Under Reservation, Central Statistics Office, revised 27th June 2018, <https://www.cso.ie/px/pxeirestat/Statire/Select-VarVal/Define.asp?maintable=CJA01&PLanguage=0>

5 Courts Service, *Courts Service Annual Report 2016* (Dublin: Courts Service), 63, [http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/300A-3D2A10D824E88025816800370ED2/\\$FILE/Courts%20Service%20Annual%20Report%202016.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/300A-3D2A10D824E88025816800370ED2/$FILE/Courts%20Service%20Annual%20Report%202016.pdf)

RECOMMENDATIONS

- 1** **THAT IRELAND DECRIMINALISE** possession of small amounts of drugs for personal use. Continued criminalisation of people who use drugs is unsupportable by the best available evidence as a policy choice, and is in stark contradiction to a health-led policy for drug use.
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- 2** **THAT, IN DESIGNING** such a policy, the focus is on pragmatic interventions which focus on health, and include the following:

- a. Threshold limits which are reasonable, reflect the lived experience of people who use drugs and which serve as broad guidelines, not as inflexible standards. To protect against people attempting to thwart the system, intent should also be a key consideration for decision makers where people are in possession of small amounts
 - b. Sanctions which are not punitive, but solely health based, supportive, voluntary and with as many opportunities afforded to the individual as needed. The sanctions chosen should recognise that not all drug use is problematic, and where possible, utilise existing structures and services, with defined pathways and interventions set in advance
 - c. Decisions that are taken as close to the first point of contact as possible
 - d. Training for health workers, educators, law enforcement and judiciary on the aims and implementation of the new system
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- 3** **THAT ANY POLICY** that is introduced be independently evaluated in terms of implementation and impact, and that adequate resources be made available for this purpose.

INTRODUCTION

Ireland is currently at a pivotal point in relation to drug policy. In recent years, significant steps have been taken towards implementing a progressive drug policy that focuses on health, and not criminal justice, as the appropriate state response to drug use. In May 2017, the *Misuse of Drugs (Supervised Injecting Facilities) Act 2017*⁶ was signed into law, providing the country with a legal framework within which such services can operate in Ireland. In July 2017, the Department of Health published the country's new national drugs strategy, *'Reducing Harm, Supporting Recovery'*, the cover strapline of which clearly indicates that the country is committed to a *'health-led response to drug and alcohol use'*.⁷ In the foreword to the strategy, An Taoiseach,⁸ Dr. Leo Varadkar TD, notes that the strategy *'emphasises a health-led response to drug and alcohol use in Ireland'*, and that :

*"Treating substance abuse and drug addiction as a public health issue, rather than as a criminal justice issue, helps individuals, helps families, and helps communities. It reduces crime because it rebuilds lives. So it helps all of us."*⁹

This firm affirmation, in national policy documents, that the challenges of drugs, at least insofar as they relate to *drug use*, lie clearly in the health domain has been welcomed by observers.¹⁰ However, to ensure that firm policy is reflected in firm practice, there is a need to consider how Ireland currently responds to drug use. A key issue in this regard is the question of how the state should respond when it detects people in possession of small amounts of drugs for personal use. Specifically, the issue is whether the current approach, which criminalises possession for personal use, is justifiable within a policy which espouses a health-led approach to drug use. This is an issue which is of concern to the state, and action is being taken to consider it in detail. Pursuant to action 3.1.35 of *'Reducing Harm, Supporting Recovery'*, a working group has been established to consider the approaches taken in other jurisdictions to the possession of small quantities of drugs for personal use with a view to making recommendations on policy options.¹¹ The working group was established in December 2017, and is scheduled to report within 12 months. The working group's findings are of critical importance, both practically, in terms of ensuring that the explicit policy approach of the state is reflected in the methods that are used to respond to drug use on an everyday basis; and temporally, given that the current strategy runs until 2025 and that the group's recommendations, if adopted, will likely shape Irish policy in the area for at least the next seven years.

6 Misuse of Drugs (Supervised Injecting Facilities) Act 2017, Act number 7 of 2017, Act of the Oireachtas, <http://www.irishstatutebook.ie/eli/2017/act/7/enacted/en/html>

7 Department of Health, *Reducing Harm, Supporting Recovery – A health-led approach to drug and alcohol use in Ireland 2017-2025*, (Dublin: An Roinn Sláinte, 2017), <https://health.gov.ie/wp-content/uploads/2017/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>

8 The Prime Minister of Ireland

9 Department of Health, *Reducing Harm, Supporting Recovery – A health-led approach to drug and alcohol use in Ireland 2017-2025*, (Dublin: An Roinn Sláinte, 2017), 3, <https://health.gov.ie/wp-content/uploads/2017/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>

10 The Irish Times View, "Drugs and alcohol: putting health centre-stage", *Irish Times*, 20th July, 2017, <https://www.irishtimes.com/opinion/editorial/drugs-and-alcohol-putting-health-centre-stage-1.3160279>

11 Department of Health, *Reducing Harm, Supporting Recovery – A health-led approach to drug and alcohol use in Ireland 2017-2025*, (Dublin: An Roinn Sláinte, 2017), 54, <https://health.gov.ie/wp-content/uploads/2017/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>

This paper has been developed by contributors with significant experience in the fields of national and international drug policy and drug policy reform. It has two purposes. First, to provide an evidence source on decriminalisation in the Irish context. Second, to ensure that there is a strong civil society contribution to what is a national policy discussion of significant importance. It aims to reach a number of expert audiences including civil society participants in drug policy and specialist stakeholders like the working group, but it is also hoped that it will be accessible to members of the general public with an interest in drug policy. To ensure relevance to the working group's remit, this work will seek, where possible, to reference the specific tasks assigned under action 3.1.35 of 'Reducing Harm, Supporting Recovery'. For reference, the working group has been established:

"...to consider the approaches taken in other jurisdictions to the possession of small quantities of drugs for personal use in light of the Report of the Joint Committee on Justice, Defence and Equality on a Harm Reducing and Rehabilitative approach to possession of small amounts of illegal drugs to examine:

- a) the current legislative regime that applies to simple possession offences in this jurisdiction and the rationale underpinning this approach, and any evidence of its effectiveness;*
- b) the approaches and experiences in other jurisdictions to dealing with simple possession offences;*
- c) the advantages and disadvantages, as well as the potential impact and outcomes of any alternative approaches to the current system for the individual, the family and society, as well as for the criminal justice system and the health system*
- d) the identification of the scope of any legislative changes necessary to introduce*

alternative options to criminal sanctions for those offences;

- e) a cost benefit analysis of alternative approaches to criminal sanctions for simple possession offences; and*
- f) make recommendations to the relevant Minister within twelve months."*¹²

In seeking to address each of these issues, this paper adopts the following format:

CHAPTER 1 provides context from a general policy perspective, both at international and domestic levels, and helps to frame the rationale for the current legislative regime in Ireland.

CHAPTER 2 deals with the current legislative regime that applies to simple possession offences in this jurisdiction

CHAPTER 3 deals with the evidence, and covers the approaches and experiences in other jurisdictions to dealing with simple possession offences. It outlines the advantages and disadvantages, as well as the potential impact and outcomes of any alternative approaches to the current system for the individual, the family and society, as well as for the criminal justice system and the health system; it also considers any evidence specific to Ireland and includes a note on cost-benefit analyses

CHAPTER 4 provides conclusions and recommendations

Finally, and as an opening caveat, it is important to note some key points. First, this paper deals with the concept of decriminalisation of

¹² Department of Health, *Reducing Harm, Supporting Recovery – A health-led approach to drug and alcohol use in Ireland 2017–2025*, (Dublin: An Roinn Sláinte, 2017), 58, <https://health.gov.ie/wp-content/uploads/2017/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>

possession of small amounts of illicit drugs for personal use as a policy choice. Simply put, this is restricted to the argument that the criminal law is not the best policy tool to use in responding to simple possession. This is clearly a limited focus, and it is worth noting at the outset that decriminalisation – in this context, addressing simple possession of controlled substances using some mechanism other than the criminal law – is very distinct from legalisation.¹³ Under a decriminalised model the behaviour (possession of drugs for personal use) remains illegal, but the criminal law is no longer used. Instead, the matter can be addressed as an administrative offence and civil sanctions may apply. However, in a legalised environment, the behaviour is officially permitted. Typically, legalisation also implies market regulation, as is the case for alcohol or tobacco. Decriminalisation and legalisation should not be conflated, but sometimes are. Second, decriminalisation as set out in this paper deals only with simple possession. Other crimes which people may commit – for example, in order to acquire more drugs as part of a cycle of problematic use – are not within the scope of this paper. Again, the two should not be conflated, but sometimes are.

13 For a further discussion of terms such as 'decriminalisation' and 'legalisation' see, for example, Martin Jelsma, "The development of international drug control: Lessons learned and strategic challenges for the future, (working paper, prepared for the first meeting of the global commission on drug policies, Geneva, 24–25 January 2011), http://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Com_Martin_Jelsma.pdf , "Video: What is decriminalisation of drugs?," Videos, European Monitoring Centre for Drugs and Drug Addiction, <http://www.emcdda.europa.eu/video/2015/what-is-decriminalisation-of-drugs>



“CRIMINALISING PEOPLE FOR SIMPLE POSSESSION MAKES NO SENSE. IT’S DAMAGING TO THE PERSON AND TO OUR SOCIETY. IT’S EXPENSIVE, INEFFECTIVE AND UNNECESSARY, AND IT CAUSES MARGINALISATION RATHER THAN INCLUSION. WE NEED TO DECRIMINALISE AND WE NEED TO DO IT SOON.”

FR. PETER MCVERRY SJ

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**A 'HARM
REDUCING AND
REHABILITATIVE
APPROACH'**

KEY POINTS

- 1 **THE POLICY FOCUS** at international level has shifted over time – from an initial focus on supply and trafficking through a concerted effort to use the criminal law to address personal drug use, to today where the evidence is leading to a changing policy environment where the harms of criminalisation are well understood, and alternative approaches are pursued.
- 2 **DOMESTICALLY, LEGISLATORS HAVE** always emphasised the importance of the health of people who use drugs, and the harms of being prosecuted, even where one is acquitted, are well recognised by the state.

THE INTERNATIONAL POLICY BACKGROUND

The control of drugs has been a concern of states for almost three centuries; a focus on punishing the person using drugs has been present since the outset. The earliest record dates to 1729, when the Chinese Emperor Yongzheng issued an edict prohibiting the smoking of opium.¹⁴ Understandably, early interventions tended to be unilateral or bilateral affairs, given the nature of international cooperation at the time. The multilateral system in place today can trace its roots from the 1909 International Opium Commission which met in Shanghai, the International

Opium Conference in 1912 in The Hague and the formation of the League of Nations in 1920, through to the establishment of the United Nations in 1945. As Lines notes, the UN era is:

*“...marked by the drafting and ratification of three new conventions that incorporate and expand upon the previous League of Nations instruments. It includes the creation of new and invigorated supervisory bodies, and increased State participation in the regime to the point where the treaties today enjoy near universal ratification.”*¹⁵

The three conventions are the 1961 Single Convention on Narcotic Drugs (and the 1972 Protocol Amending the Single Convention); the 1971 Convention on Psychotropic Substances ('the 1971 Convention'); and the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ('the 1988 Convention'). For the purposes of this paper, the 1988 Convention is of particular interest as it codified, at an international level, a requirement to criminalise people who use drugs:

14 For a fuller discussion of the historical context, see, for example Richard Lines, *Drug control and human rights in international law*, (Cambridge: Cambridge University Press, 2017).

15 Richard Lines, *Drug control and human rights in international law*, (Cambridge: Cambridge University Press, 2017), 4

“The 1988 convention also requires that each party establishes as a criminal offence the possession, purchase, or cultivation of illicit drugs for personal consumption¹⁶...There is, however, a distinction between the penalties for trafficking and those for personal consumption offences¹⁷. Trafficking offences must be liable to sanctions which take into account the grave nature of such offences. The sanctions should include imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation. There is no similar requirement to have imprisonment, pecuniary sanctions and confiscation available as penalties for personal consumption offences.”¹⁸

Thus, while earlier treaties, such as those under the League of Nations structure, were ‘more regulatory than prohibitive’¹⁹ it can be fairly said that the thrust of the Conventions has been generally restrictive. In particular, the 1988 Convention represents a marked shift towards the criminalisation of drug use, with the introduction of the requirement for possession for personal consumption to be a criminal offence. While both the 1961 Convention (as amended) and the 1971 Convention addressed possession, “the 1988 Convention required for the first time

that possession of a controlled drug for personal use be treated as a criminal offence.”²⁰

However, it is to be noted that the operative Convention provisions concerning criminalisation are qualified rather than absolute. Leeway is given to parties in relation to implementation, particularly with regard to offences committed by people who use drugs, or those committed not for the purposes of trafficking. For example, in the 1988 Convention, Article 3(2) provides that:

“Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.”(Emphasis added)

And, in relation to sanction, article 3(4)(d) provides that:

“The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.” (Emphasis added)

Thus, while the 1988 Convention demands criminalisation of possession, this is subject to significant qualifications, not least in relation to sanction where a range of progressive responses aimed at supporting the person are available as alternatives to any sort of

16 United Nations, *Treaty Series*, vol. 1582, No. 27627, Article 3(2), <https://treaties.un.org/doc/publication/unts/volume%201582/volume-1582-i-27627-english.pdf>

17 United Nations, *Treaty Series*, vol. 1582, No. 27627, Article 3(4), <https://treaties.un.org/doc/publication/unts/volume%201582/volume-1582-i-27627-english.pdf>

18 Viscountess Runciman BDE (Chair), *Drugs and the Law: Report of the Independent Inquiry into the Misuse of Drugs Act 1971* (London: The Police Foundation, 2000), 12–14

19 Martin Jelsma, “The development of international drug control: Lessons learned and strategic challenges for the future, (working paper, prepared for the first meeting of the global commission on drug policies, Geneva, 24–25 January 2011), 2 http://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Com_Martin_Jelsma.pdf

20 Martin McDonnell, *Misuse of Drugs: Criminal Offences and Penalties* (Dublin: Bloomsbury, 2010), [1.07]

punitive approach. Nonetheless, the importance of the tone set at international level should not be understated – it has been noted that the 1988 Convention's adoption 'marks the apogee of prohibition as a global response to drugs'.²¹ This response continued through to the United Nations General Assembly Special Session (UNGASS) on Drug Abuse in 1990, and on the World Drug Problem in 1998 – the latter convening under the banner of 'A Drug-Free World – We Can Do It'.²²

Clearly, the stated goal of a drug-free world has not been achieved and this has resulted in an international policy arena which is not as unified as it once was: for the first time since 1998, the 2016 UNGASS again focused on the world drug problem and this time there was:

"significant discontent between countries over appropriate ways to approach the drug trade and drug use. Several countries call for decriminalisation and regulation, though these remain absent from the outcome document".²³

As the International Drug Policy Consortium has noted regarding decriminalisation discussions at the UNGASS:

"Colombia's country statement contended that 'Not one mother would prefer the jail

option. Jails are for criminals, not for addicts. Criminalization has affected the weakest ones in the chain: farmers, mules and consumers'. Additional support for a move away from criminalisation came from Costa Rica, the Czech Republic, Ecuador, Greece, Iceland, Jamaica, the Netherlands, Portugal, Slovenia, Switzerland, Trinidad and Tobago, Tunisia, the USA and Uruguay. Many other countries and the European Union cited the need for more proportionate sentencing. Some countries, however, spoke directly against the decriminalisation of drug use, including Algeria, Morocco, Pakistan, Sudan (both on behalf of the Africa Group, and in their own statement) and Turkey (who announced that they have increased penalties). Nicaragua and Zambia also claimed that decriminalisation was contrary to the international drug conventions, despite recent assurances from the INCB and the UNODC that this is not the case."²⁴

As far as the focus on criminalising behaviours associated with personal drug use is concerned, the shift from bodies espousing a criminal justice approach towards a health-led approach is informed by a substantial and increasing body of evidence showing that criminalising people who use drugs is ineffective at best, and causes significant damage in many cases. As the Global Commission on Drug Policy have noted:

"Criminalization of drug use and possession has little to no impact on levels of drug use in an open society. Such policies do, however, encourage high risk behaviours such as unsafe injecting, deter people in need of

21 Global Commission on Drug Policy, *Advancing Drug Policy Reform: A new approach to decriminalisation* (Global Commission on Drug Policy, 2016), 9, <http://www.globalcommissionondrugs.org/wp-content/uploads/2016/11/GCDP-Report-2016-ENGLISH.pdf>

22 General Assembly Twentieth Special Session", United Nations, accessed 28th August 2018, <http://www.un.org/ga/20special/>

23 Global Commission on Drug Policy, *Advancing Drug Policy Reform: A new approach to decriminalisation* (Global Commission on Drug Policy, 2016), 10, <http://www.globalcommissionondrugs.org/wp-content/uploads/2016/11/GCDP-Report-2016-ENGLISH.pdf>

24 International Drug Policy Consortium, *The United Nations General Assembly Special Session (UNGASS) on the World Drug Problem. Report on Proceedings*, September 2016 (London: IDPC, 2016), 5 https://www.drugsandalcohol.ie/26049/1/UNGASS-proceedings-document_ENGLISH.pdf



“I’VE NEVER MET ANYONE ACCESSING OUR SERVICES WHO HAS BENEFITED FROM BEING CRIMINALISED. INSTEAD OF PULLING PEOPLE CLOSER AT A TIME THEY NEED HELP, IT PUSHES THEM AWAY AND MAKES IT HARDER FOR THEM TO FOCUS ON WHY THEY FEEL THE NEED TO USE DRUGS IN THE FIRST PLACE. THIS ISN’T A SMART APPROACH - WE SHOULD BE HELPING PEOPLE REDUCE THE HARM DRUGS CAUSE IN THEIR LIVES, NOT ADDING TO IT.”

DAWN RUSSELL, ANA LIFFEY DRUG PROJECT

drug treatment from seeking it, divert law enforcement resources from focusing on serious criminality, reduce personal and government funds that might otherwise be available for positive investment in people’s lives, and burden millions with the longlasting negative consequences of a criminal conviction.”²⁵

As this understanding deepens, many international bodies have become explicit in calling for a policy shift. For example, in his message on International Day Against Drug Abuse and Illicit Trafficking in 2015, then United Nations (UN) Secretary General Ban Ki-Moon called on UN member states to ‘consider alternatives to criminalization and incarceration of people who use drugs and focus criminal justice efforts to those involved in supply. We should increase the focus on public

25 Global Commission on Drug Policy, *Taking Control: Pathways to Drug Policies that Work* (Global Commission on Drug Policy, 2014), 7, <http://www.globalcommissionondrugs.org/reports/taking-control-pathways-to-drug-policies-that-work/>

health, prevention, treatment and care, as well as on economic, social and cultural strategies'.²⁶

A number of UN agencies have also issued statements in favour of decriminalisation. For example, in 2015, the Joint UN Programme on HIV/AIDS (UNAIDS) supported a commitment to:

*"...treating people who use drugs with support and care, rather than punishment. UNAIDS believes that this objective can only be achieved by implementing alternatives to criminalization, such as decriminalization and stopping incarceration of people for consumption and possession of drugs for personal use."*²⁷

Similarly, the UN Development Programme (UNDP) has noted the human development cost of punitive policies:

*"Discrimination, a lack of investment in health and social welfare, and laws criminalizing the use or possession of small amounts of drugs for personal use impede access to basic services such as housing, education or health care including treatment"*²⁸

The United Nations Office on Drugs and Crime (UNODC) has noted a number of unintended consequences of punitive policies, including the criminalisation and marginalization of people who use drugs, often amplified through the use

of the criminal justice system to address drug use and minor possession.²⁹

At the European Union level, Action 22 of the EU Action Plan on Drugs 2017–2020 calls for Member States to provide and apply, where appropriate and in accordance with their legal frameworks, alternatives to coercive sanctions for drug using offenders.³⁰

Finally, speaking at a side event at the UNGASS in 2016, Werner Sipp, the President of the International Narcotics Control Board (INCB) recognised the decriminalisation approach currently in place in Portugal as a 'model of best practices' in 2016.³¹ In its 2016 Annual Report, INCB reiterated that:

*"States are not obliged to adopt punitive responses for minor drug-related offences, including possession of small quantities of drugs for personal use, committed by people who abuse drugs"*³²

Thus, the policy approach concerning criminal justice approaches at international level has shifted over time – from an initial focus on supply and trafficking through a concerted effort

26 Text available online at <http://www.unis.unvienna.org/unis/en/pressrels/2015/unissgsm645.html>

27 Joint United Nations Programme on HIV/AIDS (2015) A public health and rights approach to drugs; at p.6. Available online at http://www.unaids.org/sites/default/files/media_asset/JC2803_drugs_en.pdf

28 United Nations Development Program (2015) Addressing the development dimensions of drug policy, at p.7 <http://www.undp.org/content/dam/undp/library/HIV-AIDS/Discussion-Paper--Addressing-the-Development-Dimensions-of-Drug-Policy.pdf>

29 Cited in United Nations Development Program (2015), United Nations Development Program, *Addressing the development dimensions of drug policy* (UNDP, 2015), 12, <http://www.undp.org/content/dam/undp/library/HIV-AIDS/Discussion-Paper--Addressing-the-Development-Dimensions-of-Drug-Policy.pdf>

30 EU Action Plan on Drugs 2017–2020 (2017), *Official Journal of the European Union*, C215, 5th July 2017, 21–58.

31 The Portuguese Approach and the International Drug Control Conventions" (PowerPoint presentation, UNGASS 2016 side event, New York, 20th April 2016), https://www.unodc.org/documents/ungass2016/SideEvents/Side_event_Portugal/Pre-sentation_of_Werner_Sipp_President_INCB.pdf

32 International Narcotics Control Board, *Report 2016* (INCB, 2017), 41, https://www.drug-sandalcohol.ie/26947/1/International_Narcotics_Control_Board%20-2016.pdf

to use the criminal law to address personal drug use, to today where the evidence is leading to a changing policy environment where the harms of criminalisation are well understood, and alternative approaches are pursued. Although there are still significant challenges internationally – many countries still use coercive measures like compulsory treatment under the guise of health, for instance – the focus is increasingly on human rights and health for behaviours related to personal use.

THE DOMESTIC POLICY BACKGROUND

From a national policy perspective, the primary legislation in the area is the *Misuse of Drugs Act 1977*, which, pre-empting the rigours of the 1988 Convention, criminalised to varying degrees personal drug use, possession and cultivation.³³ Before looking at the development of this approach, it is worth noting that, as a general principle, criminalisation is not something to be taken lightly. As the Director of Public Prosecutions notes:

“The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the conse-

*quences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence”.*³⁴

Given the obvious and wide ranging negative impacts of criminalisation, it is perhaps surprising that it was the tool of choice for legislators at all in this policy arena. Indeed, it is interesting to note that while the criminalisation of possession for personal use has been formal law and policy in Ireland for the last four decades, it is not clear that the inevitable consequence of that approach – punishing people who used drugs – was ever an intentional one. It is clear from the Oireachtas debates³⁵ that the health of people who were using drugs was a primary concern. At the time the Bill was passing through the Oireachtas, a number of members noted the predicament in which many people who use drugs find themselves. Speaking in the Senate, Noel Browne, himself a doctor, noted that:

“I see only a difference of degree between the person who takes out a cigarette before making a speech, as many Senators may do outside, or the Deputies or many of us in politics who take a glass of whiskey, or whatever it is, and the unfortunate person who feels that the only solution to his emotional stress problem is to jump in the river or to take his life. It is a question of degree. The only matter which is important to me is that he is simply responding to a stress situation that he did not bring on himself –he did not choose to be like that. That is the kind of personality he has and that this is

33 The basic legal framework in Ireland is considered in more detail in chapter 2

34 Director of Public Prosecutions, *Guidelines for Prosecutors*, 4th Ed. – October 2016 (Dublin : Office of the Director of Public Prosecutions, 2016), 12, [https://www.dppireland.ie/filestore/documents/Guidelines_for_Prosecutors_\[4th_Edition_-_October_2016\].pdf](https://www.dppireland.ie/filestore/documents/Guidelines_for_Prosecutors_[4th_Edition_-_October_2016].pdf)

35 And, indeed, from the fact that the legislation was a health bill, not a criminal justice one

the way he responds to his stress problem—each of us in his own way, each with somewhat safer ways of dealing with our stress problems. All of us have varying degrees of emotional stress as a result of life experience. My main theme in all this is that none of them is blameworthy. Each one of us is a product of our environment or the emotional milieu in which we developed, the handling or mishandling we have had, the different lives, the happiness or unhappiness of marriage, children—all of the thousand and one problems which face humanity in society.”³⁶

For his part, the Minister for Health at the time, Mr. Corish, noted the progression towards less punitive sanctions for individuals who used drugs as the bill evolved from earlier drafts (emphasis added):

*“The Bill is designed on the one hand to ensure we have the most effective controls possible over drugs which can be abused and we have that in this Bill. On the other hand, and this was a very vital change that was made in the first Bill that was produced, **we want to ensure that the people with a drug problem are dealt with sympathetically and have the most effective range of care and treatment possible.**”³⁷*

In the Dáil, then spokesperson on health for Fianna Fáil, Mr. Haughey, also noted the inherent conflict at the heart of the problem

facing the legislature, recognising the imperfect information to hand and, in particular, the challenge of how to balance the rights of individuals and the rigours of the criminal law (emphasis added):

*“Throughout the legislation we have had to endeavour to maintain a balance, to strike a happy medium and to try to preserve the individual rights and personal freedom of individual citizens while at the same time giving the authorities the necessary powers to implement the legislation effectively. **We have had to try, too, to bring in legislation that would render certain acts punishable but we have had to recognise that very often people committing these offences are not guilty of criminal activity in the normal sense but, perhaps, are people who require medical care and attention rather than punishment.** [...] All the time we were confronted with this basic underlying problem of the medical people concerned disagreeing as to what should be done. They were not prepared to give us a unanimous opinion as to what line we should adopt in regard to this modern problem of the misuse of drugs.”³⁸*

Thus, the Oireachtas was very much alive to the fact that the Bill would criminalise people who were ‘not guilty of criminal activity in the normal sense’, and required care rather than punishment. Criminalising people who used drugs was not a key motivator for legislators. Personal drug use was something to be addressed through assistance, not punishment, and the Bill was a genuine and honest attempt to find an appropriate balance. President Michael D. Higgins, then a sitting Senator, joined with his

36 Seanad Éireann debate, 5th May 1977, Misuse of Drugs Bill (1973); Second Stage (Resumed), “Debates, Oireachtas Éireann, updated 11th March 2018, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/DebatesWebPack.nsf/takes/seanad1977050500004?opendocument>

37 Seanad Éireann debate, 5th May 1977, Misuse of Drugs Bill (1973); Second Stage (Resumed), “Debates, Oireachtas Éireann, updated 11th March 2018, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/DebatesWebPack.nsf/takes/seanad1977050500004?opendocument>

38 Dáil Éireann debate, 31st March 1977, Misuse of Drugs Bill (1973); Fifth Stage, “Debates, Oireachtas Éireann, updated 11th March 2018, <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/takes/dail1977033100006>

colleagues in the Seanad in “complimenting the Minister for erring on the side of humanity”³⁹.

In 1977, when the primary legislation was enacted, the country was responding to the problem of non-prescribed substance use. As a comparative analysis, it is useful to note that a similar impetus arose in the late 2000s. With novel psychoactive substances flooding the market through ‘head shops’, legislators again faced the challenge of how to best control the new substances. There were two legislative interventions. First, a range of new substances were scheduled under the *Misuse of Drugs Act 1977* (‘the 1977 Act’) in May 2010. Second, new legislation was introduced in August 2010. The new legislation, the *Criminal Justice (Psychoactive Substances) Act 2010* (‘the 2010 Act’) took a different tack to the 1977 Act. Notably, it is a piece of criminal justice legislation, not health legislation. Delegated powers under the 2010 Act are to the Minister for Justice, not Health. Further, and interestingly, while the Act criminalised a range of activities related to novel psychoactive substances, simple possession was not one of them. This issue was noted in the Dáil by Deputy Kenneally:

“Having examined the Bill, I note it is an offence to import or export so-called “legal highs”, but not to possess them. As it is an offence under present legislation to be in possession of hard drugs, I wonder why this does not extend to the present situation. For instance, if someone were to buy these new drugs off the Internet from a hidden location in Ireland, they would not be importing them. In such circumstances, it would appear that they are not breaking the law. However, if the drugs come across our

*borders, they will be covered. I ask the Minister to clarify this for the House.”*⁴⁰

In responding, Minister Ahern noted that:

*“Deputy Kenneally asked why possession is not an offence under the Bill. There are difficulties in doing so as a consequence of the general nature of the Bill. For instance, a criminal offence of possession would criminalise the possession of certain industrial substances which may have a psychoactive effect. The intention of the Bill is not to criminalise legitimate business but rather to target the activities of those who sell unregulated psychoactive substances for human consumption. We are not targeting regulated psychoactive substances that are not for human consumption.”*⁴¹

Regardless of the reasons behind the decision not to criminalise possession, the fact remains that the introduction of the 2010 Act resulted in differing approaches to simple possession of drugs for personal use in Ireland. Being in possession of a ‘controlled drug’ as defined under the 1977 Act was a crime; being in possession of a ‘psychoactive substance’ under the 2010 Act was not.

It should be noted that the 2010 Act as a supply side intervention was largely successful – the number of headshops in operation dropped dramatically and although the substances

39 Seanad Éireann debate, 5th May 1977, *Misuse of Drugs Bill (1973); Second Stage (Resumed)*, “Debates, Oireachtas Éireann, updated 11th March 2018, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/DebatesWebPack.nsf/takes/seanad1977050500004?opendocument>

40 Dáil Éireann debate, 2nd July 2010, *Criminal Justice (Psychoactive Substances) Bill 2010; Second Stage*, “Debates, Oireachtas Éireann, updated 11th March 2018, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/DebatesWebPack.nsf/takes/dail2010070200003?opendocument>

41 Dáil Éireann debate, 2nd July 2010, *Criminal Justice (Psychoactive Substances) Bill 2010; Second Stage*, “Debates, Oireachtas Éireann, updated 11th March 2018, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/DebatesWebPack.nsf/takes/dail2010070200003?opendocument>

themselves were still available, they were less obtainable to the general population than had previously been the case. For example, while there were 102 headshop premises in May 2010, by October 2010 only 10 headshops were still open and by late 2010 the Gardaí indicated that none of the remaining shops were selling NPS.⁴²

The 2010 Act and the dualist approach towards possession of substances it enshrined uncovered, in the Irish context, a key issue in drug policy – whether it is necessary or desirable, in the pursuit of reducing harm, to criminalise simple possession for personal use. This matter was considered at length by a cross-party parliamentary committee in 2015 – the Oireachtas Joint Committee on Justice, Defence and Equality on a harm reducing and rehabilitative approach to possession of small amounts of illegal drugs. Arising from a broader consideration of potential responses to gangland violence, the Committee decided to consider in detail the issue of possession. Following a visit to Portugal to consider the approach taken there, a process of inviting and receiving submissions on the issue from any interested parties and the holding of public hearings, the Committee made a number of recommendations, the first of which is as follows:

“The Committee strongly recommends the introduction of a harm reducing and rehabilitative approach, whereby the possession of a small amount of illegal drugs for personal use, could be dealt with by way of a civil/administrative response and rather than via the criminal justice route.”⁴³

The Committee's recommendations are important in a number of ways. First, they represent the views of a group of legislators who have had the opportunity to consider, in detail, whether or not the continued criminalisation of people who use drugs for simple possession of those drugs is warranted. The group visited other jurisdictions, received over 80 submissions and held hearings. Overwhelmingly, the Committee's research supported the view that people who use drugs should not be criminalised for simple possession. Second, the Committee's findings are non-partisan – the Committee held representatives from a range of political persuasions across both Houses. Finally, the Committee's work provides important background and context to the work of the working group established under 'Reducing Harm, Supporting Recovery', which is to

“consider the approaches taken in other jurisdictions to the possession of small quantities of drugs for personal use in light of the Report of the Joint Committee on Justice, Defence and Equality on a Harm Reducing and Rehabilitative approach to possession of small amounts of illegal drugs”⁴⁴

Taking a wide view of policy debates is often helpful in framing the issue, and this has been the purpose of this opening section. When we step back from the immediacy of the issue, we can see that it has never been a primary focus of most legislators to punish people for using drugs; health has always been a more important concern. This is evident too from the international perspective – the motivation behind punitive approaches is often good; unfortunately, and as will be discussed in more detail in Chapter 3, the results are often not.

42 Dillon, Lucy (2017) Headshop legislation and changes in national addiction treatment data. Drugnet Ireland, Issue 62, Summer 2017, pp. 13–14. Available online at <https://www.drugsandalcohol.ie/27740/>

43 Houses of the Oireachtas Joint Committee on Justice, Defence and Equality, *Report of the Committee on a Harm Reducing and Rehabilitative approach to possession of small amounts of illegal drugs* (Oireachtas Eireann, 2015), 10, <https://www.drugsandalcohol.ie/24750/1/Committeereport.pdf>

44 Department of Health, *Reducing Harm, Supporting Recovery – A health-led approach to drug and alcohol use in Ireland 2017–2025*, (Dublin: An Roinn Sláinte, 2017), 54, <https://health.gov.ie/wp-content/uploads/2017/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>

2

SIMPLE
POSSESSION
AND THE LAW
IN IRELAND

KEY POINTS

1 **THE PRIMARY LEGISLATION** is the Misuse of Drugs Act 1977, section 3 of which criminalises possession of substances scheduled under the legislation. Regulations made pursuant to the primary legislation also shape the law on possession, as do other pieces of legislation.

.....

2 **THERE ARE DIFFERENT** penalties applicable, depending on whether an individual was in possession of cannabis, or in possession of another scheduled substance. Although the primary legislation allows for harsh punishments – such as imprisonment for up to seven years – the reality is that the system works to effect a more humane approach in practice, and the Director of Public Prosecutions elects for summary disposal in all cases of simple possession.

.....

3 **IRELAND OPERATES A** dualist framework in relation to possession of drugs for personal use. Only possession of substances which are specifically scheduled under the Misuse of Drugs Act 1977 is a crime. Non-scheduled psychoactive substances fall to be considered under the Criminal Justice (Psychoactive Substances) Act, 2010. Simple possession is not a crime under the 2010 Act.

THE GENERAL LEGISLATIVE FRAMEWORK

As noted previously, the principal legislation controlling drugs in Ireland is the *Misuse of Drugs Act, 1977* ('the 1977 Act'). The legislative framework has been developed over time by the addition of various other pieces of legislation which either explicitly set out that they should be construed as part of the Misuse of Drugs

Acts,⁴⁵ or have been held to be *in pari materia*⁴⁶ and thus should be construed as a single legislative code, the elements of which interpret, explain and reinforce each other. These Acts are typically cited collectively as the Misuse of Drugs Acts 1977–2017.

Together, as McDonnell notes, they “constitute a legislative code which aims to prevent the non-medical usage of certain drugs and regulate

45 See, inter alia, section 16 of the Misuse of Drugs Act 1984; section 1(6) of the Criminal Justice Act, 2006; section 1(2) of the Irish Medicines Board (Miscellaneous Provisions) Act 2006; and section 1(4) of the Criminal Justice Act 2007

46 In the case of Part II of the Criminal Justice Act, 1994 (see *DPP v Power* [2007] 2 IR 509); and the Criminal Justice (Drug Trafficking) Act 1996 (see *DPP v O'Mahony and Driscoll* [2010] IESC 42)

the availability of medicinal drugs”.⁴⁷ The framework provides for a prohibitory system of control over a defined category of substances, that of ‘controlled drugs’. Section 2 of the 1977 Act provides, inter alia, as follows:

“2.—(1) In this Act “controlled drug” means any substance, product or preparation [...] which is either specified in the Schedule to this Act or is for the time being declared pursuant to subsection (2) of this section to be a controlled drug for the purposes of this Act.”⁴⁸

Controlled substances, as the name suggests, are not to be prohibited completely, but are rather to be controlled. It is worth considering this in slightly more detail. First, it will be noted that only ‘controlled drugs’ as defined in section 2(1) are subject to the legislative regime. Thus, just because something is a ‘drug’, it does not automatically mean that the provisions of the Misuse of Drugs Acts apply to it. Second, even where a drug is controlled, not all substances are treated equally under the statutes – there are differing levels of control for different substances, as set out in the *Misuse of Drugs Regulations 2017*.⁴⁹ In essence, the regulations set out a number of Schedules, each of which contains a number of named drugs. Drugs are assigned to a Schedule on the basis of their characteristics, such as their potential for abuse and their medical utility. The regulations then further set out the nature of the controls that apply to each Schedule. Schedule 1 drugs are subject to very stringent controls; those in Schedule 5 less so. Thus, the concept that drugs themselves are ‘legal’ or ‘illegal’ – so often used

in the public discourse – is poorly founded. The reality is that there is no such thing as an ‘illegal’ drug – rather, the illegality arises when a drug is not handled in line with the legislative framework.

The system of control is understandably complex, and there are a range of mechanisms by which drugs are controlled. In this paper, we are principally concerned with the operation of one such mechanism – the criminalisation of simple possession.

THE BASIC OFFENCE

Section 3 of the 1977 Act provides for the basic offence:

“3.—(1) Subject to subsection (3) of this section and section 4 (3) of this Act, a person shall not have a controlled drug in his possession.

(2) A person who has a controlled drug in his possession in contravention of subsection (1) of this section shall be guilty of an offence.

(3) The Minister may by order declare that subsection (1) of this section shall not apply to a controlled drug specified in the order, and for so long as an order under this subsection is in force the prohibition contained in the said subsection (1) shall not apply to a drug which is a controlled drug specified in the order.

(4) The Minister may by order amend or revoke an order under this section (including an order made under this subsection).”⁵⁰

⁴⁷ Martin McDonnell, *Misuse of Drugs: Criminal Offences and Penalties* (Dublin: Bloomsbury, 2010), [2.01]

⁴⁸ Section 2, Misuse of Drugs Act 1977, Act number 12 of 1977, Act of the Oireachtas, Updated to 25th May 2018, <http://revisedacts.lawreform.ie/eli/1977/act/12/section/2/revised/en/html>

⁴⁹ Misuse of Drugs Regulations, Statutory Instrument, S.I. number 173 of 2017, <http://www.irish-statutebook.ie/eli/2017/si/173/made/en/pdf>

⁵⁰ Section 3, Misuse of Drugs Act 1977, Act number 12 of 1977, Act of the Oireachtas, Updated to 25th May 2018, <http://revisedacts.lawreform.ie/eli/1977/act/12/section/3/revised/en/html>

Thus, pursuant to section 3, possession of a controlled drug is an offence except in two circumstances. First, where the Minister has declared by order that the operative provisions do not apply to that controlled drug. Second, where the possession of a controlled drug is permissible under regulations promulgated under section 4 of the Act.

Section 4 provides that:

“4.— (1) The Minister may make regulations enabling any person, or persons of a prescribed class or description, in prescribed circumstances or for prescribed purposes, to possess a controlled drug subject to such conditions (if any), or subject to and in accordance with such licence, as may be prescribed.

(2) Subject to section 13 of this Act, the Minister shall exercise his power to make regulations under this section so as to secure that it is not unlawful under this Act for a practitioner or pharmacist to have a controlled drug in his possession for the purpose of his profession or business.

(3) It shall be lawful for any person, or a person of a class or description specified in regulations under this section, to have in his possession in prescribed circumstances or for prescribed purposes, as may be appropriate, a controlled drug specified therein, provided that any conditions specified in the regulations or attached to a licence granted under this Act and applicable in the particular case are complied with by him.”⁵¹

The legal basis underpinning the Misuse of Drugs Regulations 2017 derives, in part, from the authority in section 4. The regulations provide a range of carve-outs from the basic law, primarily under ‘Part 4 - Possession of Controlled Drugs’.

There are four regulations in Part 4. The first, Regulation 10, provides a range of ‘General Exemptions’. Many controlled drugs are also important medicines, and as such, it is important to have a system which does not unduly infringe on the ability of a society to care for those in need of medical treatment which requires the use of drugs; doctors, dentists, and others who need to use drugs in their legitimate business of caring for patients must be able to do so. Thus, Regulation 10(1) allows that:

“A person who, by virtue of these Regulations, is authorised to produce, supply or offer to supply any drug specified in Schedule 2, 3 or 4 may in accordance with the provisions of these Regulations have such controlled drug in his or her possession.”⁵²

Regulation 10(2) provides an exemption for people in possession of a drug in Schedule 2, Schedule 3 or Part 1 of Schedule 4 that has been legitimately prescribed to them, provided that those prescriptions haven’t been dishonestly obtained (for example, by failing to disclose that they have a pre-existing prescription for the same drug from other practitioners).

The remaining subsections of Regulation 10 provide similar exemptions for specific groups as follows:

“(3) A person whose name is for the time being entered in a register kept for the purposes of this paragraph by the Minister under section 14 of the Principal Act may, in compliance with any conditions subject to which his or her name is so entered, have in his or her possession any drug specified in Schedule 3 or 4.

(4) The master of a foreign ship which is in a port in the State may have in his or her possession

51 Section 4, Misuse of Drugs Act 1977, Act number 12 of 1977, Act of the Oireachtas, Updated to 25th May 2018, <http://revisedacts.lawreform.ie/eli/1977/act/12/section/4/revised/en/html>

52 Misuse of Drugs Regulations, Statutory Instrument, S.I. number 173 of 2017, Regulation 10 <http://www.irishstatutebook.ie/eli/2017/si/173/made/en/pdf>

any drug specified in Schedule 2 or 3, or Part 1 of Schedule 4, so far as is necessary for the equipment of his or her ship.

(5) A person who is authorised as a member of a group may, under and in accordance with his or her group authority and in compliance with any conditions attached thereto, have any drug specified in Schedule 2 or 3, or Part 1 of Schedule 4, which is a preparation in his or her possession.”⁵³

Regulations 11 and 12 provide specific exemptions (in respect of possession of *butan-1,4-diol* or *dihydrofuran-2(3H)-one* (Regulation 11) and in respect of possession of pentazocine and pethidine by midwives (Regulation 12)).

Finally, Regulation 13 provides a range of general authorities to possess controlled drugs, in respect of:

“(a) a member of the Garda Síochána when acting in the course of his or her duty as such;
(b) a prison officer when acting in the course of his or her duty as such;
(c) an officer of customs when acting in the course of his or her duty as such;
(d) a person authorised in writing in accordance with section 24 of the Principal Act (as amended by section 9 of the Irish Medicines Board (Miscellaneous Provisions) Act 2006), when acting in the course of his or her duty as such;
(e) a person engaged in connection with the Postal Services provided by An Post when acting in the course of his or her duty as a person so engaged;
(f) a person engaged in the work of any laboratory to which the controlled drug has been sent for forensic examination when acting in the course of his or her duty as a person so engaged;
(g) a registered nurse engaged in providing palliative care when acting in the course of the nurse’s duty as a nurse so engaged;
(h) a person engaged in the business of a carrier when acting bona fide in the course of that business;

(i) a person engaged in conveying the controlled drug to a person authorised by these Regulations to have it in his or her possession;
(j) an official of the Department of Agriculture, Food and the Marine, engaged, in his or her official capacity as such, in the work of sampling for analysis of crops of *Cannabis sativa* L, for the purpose of Commission Implementing Regulation (EU) No. 809/2014 of 17 July 2014”⁵⁴

In addition to Part 4, it is also worth noting that pursuant to section 14 of the Principal Act, the Minister “*may grant licences or issue permits or authorisations for any of the purposes of this Act*”,⁵⁵ and that pursuant to Regulation 6, a person authorised by this mechanism “*may, under and in accordance with the terms of the licence and in compliance with any conditions attached thereto... have in his or her possession any controlled drug to which the licence relates*”.⁵⁶

Another recent relevant development is the *Misuse of Drugs (Supervised Injecting Facilities) Act 2017*, a piece of legislation which creates a legal framework under which supervised injecting facilities can operate in Ireland. Since people using a supervised injecting facility are, almost by definition, going to be in possession of unspecified, illegally obtained drugs, it is necessary to find a way to address the provisions of section 3 in this specific context. The act achieves this by disapplying the law in respect of authorised users:

53 Misuse of Drugs Regulations, Statutory Instrument, S.I. number 173 of 2017, Regulation 10 <http://www.irishstatutebook.ie/eli/2017/si/173/made/en/pdf>

54 Misuse of Drugs Regulations, Statutory Instrument, S.I. number 173 of 2017, Regulation 13, <http://www.irishstatutebook.ie/eli/2017/si/173/made/en/pdf>

55 Misuse of Drugs Act 1977, Act number 12 of 1977, Act of the Oireachtas, Updated to 25th May 2018, <http://revisedacts.lawreform.ie/eli/1977/act/12/section/14/revised/en/html>

56 Misuse of Drugs Regulations, Statutory Instrument, S.I. number 173 of 2017, Regulation 6, <http://www.irishstatutebook.ie/eli/2017/si/173/made/en/pdf>

“10. 1) Subsections (1) and (2) of section 3 of the Act of 1977 do not apply to an authorised user.

(2) Section 19(1)(e) of the Act of 1977, in so far as it relates to the preparation or production for immediate personal consumption by injection of a controlled drug by an authorised user, and section 19(1)(i) of the Act of 1977, do not apply to a licence holder who knowingly permits or suffers the preparation or production for immediate personal consumption by injection or the possession of a controlled drug, in a supervised injecting facility by an authorised user.

(3) Section 21(2) of the Act of 1977, in so far as it relates to the possession, preparation or production of a controlled drug for immediate personal consumption by injection does not apply to an authorised user.”⁵⁷

An ‘authorised user’ is defined by section 7 of the Act:

“7. (1) A licence holder, or the person in charge of a supervised injecting facility for the time being, may authorise a person, not being a person prescribed as being ineligible to be an authorised user, to be on the premises of a supervised injecting facility for the purpose of consuming drugs by injection.

(2) A person authorised by a licence holder or a person in charge of a supervised injecting facility for the time being, in accordance with subsection (1), is referred to in this Act as an authorised user when on the premises of a supervised injecting facility in accordance with the terms of the licence and such conditions (if any) as may be attached thereto.”⁵⁸

Finally, and as previously briefly noted, it is worth noting the approach taken under the *Criminal Justice (Psychoactive Substances) Act 2010*. This legislation was introduced to address the issue of sale and supply of novel psychoactive substances through head shops. The legislation did not criminalise possession, instead focusing on other offences such as sale or supply.

The Act as promulgated set out the offences as follows:

“3.— (1) A person who sells a psychoactive substance knowing or being reckless as to whether that substance is being acquired or supplied for human consumption shall be guilty of an offence.

(2) A person who imports or exports a psychoactive substance knowing or being reckless as to whether that substance is being acquired or supplied for human consumption shall be guilty of an offence.”⁵⁹

In this context, it’s worth noting that the definition of ‘sell’ in the act is broad and includes:

(a) to offer for sale, to invite to buy, to distribute or to expose or keep for sale, supply or distribution, and

(b) to possess for any of the purposes referred to in paragraph (a);⁶⁰

Nonetheless, the mere act of possessing a psychoactive substance is not, in and of itself, a criminal offence.

⁵⁷ Section 10, Misuse of Drugs (Supervised Injecting Facilities) Act 2017, Act number 7 of 2017, Act of the Oireachtas, <http://www.irishstatutebook.ie/eli/2017/act/7/section/10/enacted/en/html#sec10>

⁵⁸ Misuse of Drugs (Supervised Injecting Facilities) Act 2017, Act number 7 of 2017, Act of the Oireachtas, <http://www.irishstatutebook.ie/eli/2017/act/7/section/7/enacted/en/html#sec7>

⁵⁹ Section 3, Criminal Justice (Psychoactive Substances) Act 2010, Act number 22 of 2010, Act of the Oireachtas, <http://www.irishstatutebook.ie/eli/2010/act/22/enacted/en/print#sec3>

⁶⁰ Act of the Oireachtas, <http://www.irishstatutebook.ie/eli/2010/act/22/section/1/enacted/en/html#sec1>



“I WORK DIRECTLY WITH PEOPLE WHO ARE OFTEN STRUGGLING WITH THEIR DRUG USE. OFTEN, DEALING WITH THE JUSTICE SYSTEM CAN DISTRACT FROM OTHER FORMS OF WORK THAT YOU’LL DO WITH A CLIENT. COURT DATES AND APPOINTMENTS WITH A LAWYER TAKE PRECEDENCE AND CAN DISTRACT FROM THE FOCUS NEEDED TO ENGAGE. SUDDENLY THE WORK YOU DO WITH THE CLIENT IS TO SUPPORT THEM THROUGH THE CRIMINAL JUSTICE SYSTEM. THE FOCUS CAN SO EASILY BE ON WORKING TO AVOID NEGATIVE LEGAL CONSEQUENCES, RATHER THAN WORKING TOWARDS POSITIVE CHANGE. CRIMINALISATION GENERALLY IS SOMETHING TO BE AVOIDED UNLESS ABSOLUTELY NECESSARY; IN MY EXPERIENCE, CRIMINALISING SOMEONE FOR SIMPLE POSSESSION IS NEVER HELPFUL TO THEM. IT IS SIMPLY NOT PERSON-CENTRED.”

MIRANDA O’SULLIVAN, ANA LIFFEY DRUG PROJECT

STATUTORY DEFENCES

In addition to the exemptions provided by the regulations and the disapplication of the basic law under the 2017 Act, Section 29 of the 1977 act provides a range of statutory defences to a charge of possession, or to other offences under the Act where possession must be proven for the offence to be made out. It provides, *inter alia*, that:

“29.—(1) In any proceedings for an offence under this Act [...] in which it is proved that the defendant had in his possession or supplied a controlled drug, the defendant shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance, product or preparation in question was the particular controlled drug alleged

(2) In any such proceedings in which it is proved that the defendant had in his possession a controlled drug [...] it shall be a defence to prove that—

(a) he did not know and had no reasonable grounds for suspecting—

(i) that what he had in his possession was a controlled drug [...]or

(ii) that he was in possession of a controlled drug [...] or

(b) he believed the substance [...] to be a controlled drug [...] and that, if the substance... had in fact been that controlled drug he would not at the material time have been committing an offence under this Act, or

(c) knowing or suspecting it to be such a drug [...], he took or retained possession of it for the purpose of

(i) preventing another from committing or continuing to commit an offence in relation to the drug [...], or

(ii) delivering it into the custody of a person lawfully entitled to take custody of it, and that as soon as practicable he took all such steps as were reasonably open to him to destroy

the drug [...] or to deliver it into the custody of such a person.”⁶¹

Thus, when we think about the prohibition on possession in the context of modern Irish drug policy, we see the starting point as a blanket ban on simple possession of controlled substances under the Misuse of Drugs Act 1977. From this, various other legislative works have served to shape the contours of the law. Principally, these are:

- a. The Act of 1977 itself provides a mechanism under section 3(3) which permits the Minister for Health to exclude certain controlled substances from the provisions of section 3, meaning that, although on the schedule of controlled drugs, it is not a crime to possess a substance in respect of which the Minister has made an order.
- b. Similarly, section 4 of the Act of 1977 permits the Minister to make regulations regarding possession and requires the Minister to do so to ensure certain professionals (doctors, dentists) are not in contravention of the Act in their normal work. This is done through the Misuse of Drugs regulations, which also provide a range of exclusions pursuant to Part 4 therein, which are designed to give practical efficacy to the use of controlled drugs in the State.
- c. Most recently, the Misuse of Drugs (Supervised Injecting Facilities) Act 2017 disapplies section 3 of the principal act in respect of an authorized user of a supervised injecting facility.
- d. Finally, it can also be noted that the legislative regime acknowledges that there are drugs which are not scheduled, and therefore not controlled under the Misuse of Drugs framework, but which still have psychoactive effect. These substances are dealt with under the *Criminal Justice (Psychoactive Substances) Act 2010*, which does not criminalise simple possession.

61 Misuse of Drugs Act 1977, Act number 12 of 1977, Act of the Oireachtas, Updated to 25th May 2018 <http://revisedacts.lawreform.ie/eli/1977/act/12/section/29/revised/en/html>

THE NATURE AND CONSEQUENCES OF UNLAWFUL POSSESSION

Of course, the many mechanisms by which, and circumstances in which, possession can be lawful or unlawful under Irish law is not really the primary focus of the policy considerations. Of far more practical importance, and going to the heart of whether or not the current policy is health-led, is the question of what happens when there is non-compliance with the law – what is the nature and consequence of unlawful possession?

The penalties for the crime of simple possession depend on a number of issues, including whether or not it is a first or subsequent offence, and whether the drug in question is cannabis or not. The corresponding penalties are set out in section '27'(1) of the 1977 Act (as amended):

"27.— (1) Subject to section 28 of this Act, every person guilty of an offence under section 3 of this Act shall be liable—

(a) where the relevant controlled drug is cannabis or cannabis resin and the court is satisfied that the person was in possession of such drug for his personal use:

(i) in the case of a first offence,

(I) on summary conviction, to a fine not exceeding £300, or

(II) on conviction on indictment, to a fine not exceeding £500,

(ii) in the case of a second offence,

(I) on summary conviction, to a fine not exceeding £400, or

(II) on conviction on indictment, to a fine not exceeding £1,000,

(iii) in the case of a third or subsequent offence,

(I) on summary conviction, to a fine not exceeding £1,000 or, at the discretion of the court, to imprisonment for a term not exceeding twelve months, or to both the fine and the imprisonment, or

(II) on conviction on indictment, to a fine of such amount as the court considers appropriate or, at the discretion of the court, to imprisonment for a term not exceeding three years, or to both the fine and the imprisonment;

(b) in any other case—

(i) on summary conviction, to a fine not exceeding £1,000 or, at the discretion of the court, to imprisonment for a term not exceeding twelve months, or to both the fine and the imprisonment, or

(ii) on conviction on indictment, to a fine of such amount as the court considers appropriate or, at the discretion of the court, to imprisonment for a term not exceeding seven years, or to both the fine and the imprisonment."⁶²

An interesting aspect of the section is that the statutory consideration as to whether the drug was in a person's possession for personal use only applies when the drug in question is cannabis or cannabis resin. It can also be noted that the law permits incarceration for up to 12 months on summary conviction for a third offence of possession of cannabis for personal use, and up to seven years on conviction on indictment for simple possession of any other controlled substance.

62 Misuse of Drugs Act 1977, Act number 12 of 1977, Act of the Oireachtas, <http://revisedacts.lawreform.ie/eli/1977/act/12/section/27/revised/en/html>. References to amounts should be construed as per conversion in Euro Changeover (Amounts) Act 2001

It is clear that the nature of simple possession is criminal, and the potential penalties are significant and include incarceration. However, the reality is that the legal system has for a long time dealt with these cases, and for an equally long time has recognised that harsh punitive measures are neither a desirable nor effective use of the law insofar as simple possession is concerned. The Director of Public Prosecutions, pursuant to the powers conferred on her by section 8(4) of the *Garda Síochána Act, 2005*, has issued guidance indicating that she elects for summary disposal in all section 3 cases without submission of a Garda file.⁶³ Equally, that a person convicted under section 3 may be in need of assistance rather than punishment is further evidenced by section 28 of the Principal Act, under which courts can remand persons convicted under section 3 to obtain reports (for example, from the Health Service Executive or the Probation Service) and:

“(2) Having considered the reports...the court shall, if in its opinion the welfare of the convicted person warrants its so doing, instead of imposing a penalty under section 27 of this Act... either—
(a) permit the person concerned to enter into a recognisance containing such of the following conditions as the court considers appropriate having regard to the circumstances of the case and the welfare of the person, namely—
(i) a condition that the person concerned be placed under the supervision of such body or person as may be named in the order and during a period specified in the order...
(ii) a condition requiring such person to undergo medical or other treatment recommended in the report,
(iii) a condition requiring such person for such treatment to attend or remain in a hospital, clinic or other place specified in the order for a period so specified,
(iv) a condition requiring the person to attend

a specified course of education, instruction or training, being a course which, if undergone by such person, would, in the opinion of the court, improve his vocational opportunities or social circumstances, facilitate his social rehabilitation or reduce the likelihood of his committing a further offence under this Act, or

(b) order that the person be detained in custody in a designated custodial treatment centre for a period not exceeding the maximum period of imprisonment which the court may impose in respect of the offence to which the conviction relates, or one year, whichever is the shorter.”⁶⁴

Contravening the regulations is also an offence pursuant to section 21 which provides, inter alia, that:

“(2) Any person who, whether by act or omission, contravenes or fails to comply with regulations under this Act shall be guilty of an offence.”⁶⁵

The corresponding penalties are set out in section 27(6) (as amended):

(6) Every person guilty of an offence under section 21 (2) of this Act shall be liable—

(a) in case the regulation in relation to which the offence was committed is a regulation made pursuant to section 5 (1) (a) of this Act, other than a regulation regulating the transportation of controlled drugs,

(i) on summary conviction, to a fine not exceeding £1,000 or, at the discretion of the court, to imprisonment for a term not exceeding twelve months, or to both the fine and the imprisonment, or

(ii) on conviction on indictment, to a fine of such amount as the court considers appropriate or, at the discretion of the court, to imprisonment for a term not exceeding

63 Director of Public Prosecutions, “General direction no. 3, 8th November 2011”, https://www.dppireland.ie/filestore/documents/General_Direction_No._3.pdf

64 Section 28, Misuse of Drugs Act 1977, Act number 12 of 1977, Act of the Oireachtas, <http://revisedacts.lawreform.ie/eli/1977/act/12/section/28/revised/en/html>

65 Section 21, Misuse of Drugs Act 1977, Act number 12 of 1977, Act of the Oireachtas, <http://revisedacts.lawreform.ie/eli/1977/act/12/section/21/revised/en/html>

fourteen years, or to both the fine and the imprisonment, and
(b) in case the regulation in relation to which the offence was committed is a regulation made otherwise than under the said section 5 (1) (a) or is a regulation regulating the transportation of controlled drugs—
(i) on summary conviction, to a fine not exceeding £500 or, at the discretion of the court, to imprisonment for a term not exceeding six months, or to both the fine and the imprisonment, or
(ii) on conviction on indictment, to a fine of such amount as the court considers appropriate, or at the discretion of the court, to imprisonment for a term not exceeding two years, or to both the fine and the imprisonment”.⁶⁶

simple possession. In the next chapter, we examine the best available evidence, noting that not only is this not the case, but that the opposite is true – criminalising simple possession increases harm and stigma, while providing little or no deterrent effect.

In conclusion, we can see that the law on possession in Ireland is understandably complex. It needs to facilitate possession in a range of circumstances and for a variety of reasons. As noted earlier, our concern here is primarily with the crime of possession under section 3 of the Misuse of Drugs Act 1977. When we look in detail at this, we see a basic offence with a number of exemptions and carve-outs. We also see an administrative reality that, even though the law allows for harsh punishment, has adapted and evolved to effect a more humane approach in practice – the DPP elects for summary disposal in all cases; the courts are given powers to provide outcomes that are more reminiscent of healthcare than criminal justice. This hardly seems desirable – it is, in essence, a delivery mechanism for healthcare which is routed through the criminal justice system, complete with all the expense, time and stress for the individual that this approach brings. If this approach is merited, it must be supported by the evidence – there must be strong public policy reasons for criminalising

66 Section 27, Misuse of Drugs Act 1977, Act number 12 of 1977, Act of the Oireachtas, <http://revisedacts.lawreform.ie/eli/1977/act/12/section/27/revised/en/html>



“I HAVE TWO SONS. I KNOW THAT ALTHOUGH THEY HAVE A LOT OF PROTECTIVE FACTORS IN THEIR LIVES, I CAN’T GUARANTEE THAT THEY WON’T USE DRUGS IN THE FUTURE. I ALSO KNOW THAT, AS A PARENT, IF THEY DID HAPPEN TO USE DRUGS IN THE FUTURE, I WOULD MUCH RATHER THAT ANY INTERVENTION WAS HEALTH FOCUSED RATHER THAN CRIMINAL JUSTICE FOCUSED. CRIMINALISING PEOPLE FOR SIMPLE POSSESSION DOESN’T DETER DRUG USE. IT JUST MAKES THE CONSEQUENCES WORSE THAN THEY NEED TO BE.”

MARCUS KEANE, ANA LIFFEY DRUG PROJECT

3

EVIDENCE

KEY POINTS

- 1 **THE REASONS FOR** drug use are complex, and there is no clear link between the harshness of a country's policy on possession of drugs for personal use and levels of drug use. Thus, we could expect prevalence figures for drug use to be broadly similar regardless of whether or not simple possession is criminalised. However, criminalising people is stigmatising and can have lasting negative impacts on their lives. Conversely, in a decriminalised system, people can benefit from health focused interventions.
- 2 **SIMPLE POSSESSION IS** a significant issue in Ireland. In 2017, there were 12,201 recorded incidents of possession of drugs for personal use, representing over 70% of all drug related offences. The District Court received 20,746 drugs offences involving 13,033 defendants in 2016.
- 3 **A NUMBER OF** countries around the world have explicitly decriminalised possession of drugs for personal use. Evidence from these jurisdictions indicates that decriminalisation can, as part of a comprehensive policy approach, improve health and social outcomes for people who use drugs. Importantly, decriminalisation also changes the way people who use drugs are perceived in society and is consistent with addressing drug use as a health issue, not a criminal justice issue.

So far, we have looked at an overview of the history of policy on personal possession, as well as considering how possession is dealt with in Irish law. In both cases, it can be seen that criminalising the people who possessed drugs for their own use was never really the desire nor the goal. Rather, criminalising simple possession was more of an unpalatable means to an end – a necessary evil in the quest to rid society of non-medical drug use. To what extent can we say this has been a success? Or, conversely, to what extent can we say that alternative systems improve matters? In the last few decades, a number of countries have explicitly decriminalised individual-level possession. At the UN General Assembly Special Session (UNGASS) in 2016, many countries espoused

the idea of treating people who use drugs as “patients, not criminals,” which for at least some of these countries implied some degree of decriminalisation of drug use and possession.⁶⁷ There have been enough such experiences in the world for lessons to be drawn about the impact of decriminalisation of drug possession as well as about how decriminalisation law and policy should best be designed and implemented. This chapter deals with the available evidence. Where possible, it acknowledges the working

⁶⁷ See, for example, *International Drug Policy Consortium, The United Nations General Assembly Special Session (UNGASS) on the World Drug Problem. Report on Proceedings, September 2016* (London: IDPC, 2016), https://www.drugsandalcohol.ie/26049/1/UNGASS-proceedings-document_ENGLISH.pdf

group's remit and covers the advantages and disadvantages, as well as the potential impact and outcomes of any alternative approaches to the current system for the individual, the family and society, as well as for the criminal justice system and the health system; it also considers any evidence specific to Ireland and includes a brief note on cost-benefit analyses.

THE IMPACT OF THE CURRENT SYSTEM

Criminal law, which carries with it the state's authority to deprive people of their liberty and punish them in other ways, is meant to be reserved for society's more serious offenses. In general, criminal sanctions are meant to serve a number of objectives, including the:

- deterrence of future criminal conduct;
- incapacitation of criminals and criminal activities through incarceration;
- rehabilitation of the offender; and
- retribution for wrong-doing (punishment for the sake of punishment).⁶⁸

Insofar as achieving these objectives is concerned, there is little evidence that criminalisation of minor drug possession is a deterrent to future drug use or possession in any sustainable way, something that has been recognised for some years by policy makers and

legal and criminal justice scholars.⁶⁹ The Global Commission on Drug Policy have noted that:

"Criminalization of drug use and possession has little to no impact on levels of drug use in an open society."⁷⁰

This was echoed by the UK Home Office in 2014:

"The disparity in drug use trends and criminal justice statistics between countries with similar approaches, and the lack of any clear correlation between the 'toughness' of an approach and levels of drug use demonstrates the complexity of the issue. Historical patterns of drug use, cultural attitudes, and the wider range of policy and operational responses to drugs misuse in a country, such as treatment provision, are all likely to have an impact."⁷¹

Moreover, some have argued that criminalisation of minor offenses in particular undermines the capacity of criminal law to deter more serious offenses.⁷²

68 UNAIDS, *Criminal law, public health and HIV transmission: A policy options paper* (Geneva: United Nations, 2002), http://data.unaids.org/publications/irc-pub02/jc733-criminallaw_en.pdf

69 See, for example, Douglas Husak, *Overcriminalization: The limits of the criminal law*, (New York: Oxford University Press, 2008); Lisa Moore and Amy Elkavich, "Who's Using and Who's Doing Time: Incarceration, the War on Drugs and Public Health", *American Journal of Public Health*, 98 (May 2008), S176–S180; Robert MacCoun, "Drugs and the law: A psychological analysis of drug prohibition", *Psychological Bulletin* 113(3) (1993), 497–512, <http://dx.doi.org/10.1037/0033-2909.113.3.497>

70 Global Commission on Drug Policy, *Taking Control: Pathways to Drug Policies that Work* (Global Commission on Drug Policy, 2014), 7, <http://www.globalcommissionondrugs.org/reports/taking-control-pathways-to-drug-policies-that-work/>

71 UK Home Office, *Drugs: International Comparators* (London: Home Office, 2014), 52, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf

72 "Stigma dilution and over-criminalization", *American Law and Economics Review* 2016; 18(1):88–121, <https://doi.org/10.1093/aler/ahv026>

Although incarceration may not be as relevant as a punishment in Ireland as it is elsewhere in the world for low-level drug crimes, it is nonetheless worth noting that even where incarceration is used, it does not necessarily incapacitate offenders with respect to drug possession, since drugs of various kinds almost invariably manage to find their way into prisons and other detention facilities.⁷³ In the Irish context, it is worth noting that of a cohort of prisoners who reported using drugs in the last year, many had used while in prison, or, indeed, started their drug use in prison. *Per Drummond et al:*

“In relation to cannabis, 88% of recent cannabis users had used the drug in prison, and for recent heroin users 84% had used the drug in prison. Among recent crack cocaine users, 53% had used the drug in prison and among recent cocaine powder users, 44% had done so in prison. A very large number of lifetime opiate users, in particular those who use heroin (43%) were initiated to the drug whilst in prison.”⁷⁴

On rehabilitation, relatively few criminal justice systems⁷⁵ have been able to demonstrate that they offer lasting rehabilitation of people in prison or otherwise detained based on sanctions imposed for drug possession. As

for retribution, each society is left to determine how it wishes to punish, but the UNGASS debate suggests that where possession is linked to drug dependence, many countries would prefer to offer a health intervention rather than punishment, or at least to appear to do so. In Ireland, this desire is explicit – at a policy level, drug use (whether dependent or not) is seen as a health issue, not as a criminal justice one.

Criminalisation of minor possession of drugs, thus, seems not to exemplify the best use of criminal law. Moreover, it is clear from the experience of many countries that criminalisation of minor drug offenses carries with it the risk of selective or unbalanced application. One of the best documented examples is the racially biased application of the law on drug possession in the United States whereby people of colour have been arrested and incarcerated at much higher rates than white people, though the prevalence of drug use is similar across these groups.⁷⁶ Similarly disparate applications of drug laws have been documented, for example, among Afro-Brazilians and indigenous persons in Canada.⁷⁷

Aside from broad factors such as the risk of selective application, or the criticism that, in the context of simple possession, the objectives of the criminal law do not seem to be met, there are also a range of individual, family and community impacts which can result from criminalisation. This is to be expected – one of the obvious and intuitive results of being criminalised is

73 United Nations Office on Drugs and Crime, *World Drug Report 2015* (United Nations publication, Sales No. E.15.XI.6), x, https://www.unodc.org/documents/wdr2015/World_Drug_Report_2015.pdf

74 Anne Drummond, Mary Codd, N Donnelly, D McCausland, J Mehegan, L Daly, and Cecily Kelleher, *Study on the prevalence of drug use, including intravenous drug use, and blood-borne viruses among the Irish prisoner population*. (Dublin: National Advisory Committee on Drugs and Alcohol, 2014), 2, <https://www.drugsandalcohol.ie/21750/>

75 Steve Rolles and Niamh Eastwood, “Drug decriminalisation policies in practice: A global summary”, in Harm Reduction International, *The global state of harm reduction 2012* (HRI: London, 2012), 157–65

76 Ashely Nellis, *The color of justice: Racial and ethnic disparity in state prisons*. (Washington, DC: Sentencing Project, 2016), <http://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>

77 Joanne Csete, Adeeba Kamarulzaman, Michel Kazatchkine, et al. *Public Health and International Drug Policy: Report of the Johns Hopkins – Lancet Commission on Drug Policy and Health* (Lancet, 2016), 387(10026):1427–1480 [https://doi.org/10.1016/S0140-6736\(16\)00619-X](https://doi.org/10.1016/S0140-6736(16)00619-X)

stigmatisation – you are a criminal; others are not. As Rolles and Eastwood⁷⁸ note:

“Criminalisation is intended to stigmatise drug use and generate social disapproval. This has resulted in discrimination against [people who use drugs] and can further increase risks by:

- undermining drug education, prevention and harm reduction efforts by alienating and marginalising key populations at higher risk of acquiring HIV, including [people who inject drugs]*
- deterring individuals from approaching services for help or volunteering information about drug use in emergency situations such as overdose*
- creating informal barriers that effectively deny antiretroviral or hepatitis C treatment to people who use drugs*
- negatively impacting on wider life opportunities, including access to housing, personal finance and employment, that are all positively linked to improved health and wellbeing,*
- justifying the continuation of counter-productive enforcement approaches, with opportunity costs for public health elements of designated drug policy budgets.”*

To get an idea of how far reaching this issue may be in Ireland, we can look to the Central Statistics Office (CSO), who have a role in compiling crime statistics. For 2017, CSO figures note that there were 16,850 controlled drug offences in Ireland.⁷⁹ Of these, 12,201 (72%) related to possession of drugs for personal use.

These figures are compiled in line with the crime counting rules as follows:

“In summary, incidents reported or which become known to An Garda Síochána are recorded as crime incidents if a member of An Garda Síochána determines that, on the balance of probability, a criminal offence defined by law has taken place, and there is no credible evidence to the contrary.”⁸⁰

Further, it is also worth noting that statistics counted in this matter are also subject to the primary offence rule:

“Where two or more criminal offences are committed in a single episode, it is the primary recorded crime incident which is counted. The primary incident is the incident for which the suspected offender would receive the greatest penalty on conviction”⁸¹

Thus, it is not the case that these statistics are capturing circumstances where a person was found or suspected to be in possession of controlled substances as part of the commission of some broader, more serious pattern of criminality – rather, they relate to those occasions when possession was the most serious incident to be addressed.

Of course, identification and recording possession as a crime incident is not the same as prosecution. The Courts Service report that,

78 Steve Rolles and Niamh Eastwood, “Drug decriminalisation policies in practice: A global summary”, in Harm Reduction International, *The global state of harm reduction 2012* (HRI: London, 2012), 158

79 Recorded Crime Offences Under Reservation (Number) by Type of Offence and Year,” Statistics Under Reservation, Central Statistics Office, revised 27th June 2018, <https://www.cso.ie/px/pxeirestat/Statire/Select-VarVal/Define.asp?maintable=CJA01&PLanguage=0>

80 “Background Notes,” Statistics, Central Statistics Office, accessed 28th August 2018, <http://www.cso.ie/en/releasesandpublications/ep/p-rc/recordedcrimeq42017/backgroundnotes/>

81 “Background Notes,” Statistics, Central Statistics Office, accessed 28th August 2018, <http://www.cso.ie/en/releasesandpublications/ep/p-rc/recordedcrimeq42017/backgroundnotes/>

in 2016,⁸² there were 20,746 drugs offences involving 13,033 defendants received by the District Court. As the Courts Service figures are reported by broad category as opposed to specific charge, and considering the fact that a case may be received by the court in a different time period to when it was detected, the CSO figures and Courts Service figures are not directly comparable. Nonetheless, it is clear that the District Court deals with a large number of simple possession charges.

In terms of incarceration, as at the end of April 2016 there were 54 people incarcerated for unlawful possession⁸³ (not in the context of supply). A 2016 review of drug and alcohol treatment services for adult offenders in prison and in the community noted that consultations with service providers, the Probation Service, the Irish Prison Service and the Health Service Executive all highlighted a number of recent changes that were impacting capacity to treat offenders with addictions, including:

“The possibility of decriminalisation of possession for own use or expunging of convictions for possession. Many practitioners welcome this potential legislative move as they believe that fear of criminalisation, especially amongst young people, inhibits access to treatment”⁸⁴

In considering the human impact that these figures represent, it is important to recall the DPP’s comments on prosecution.⁸⁵ Criminalisation is stigmatising. It does not matter that it is for a minor offence, or that the consequences may be relatively light. It does not even matter if the person is ultimately acquitted or if the charges are struck out – the fact of being criminalised, of being prosecuted, is stigmatising in and of itself.

Finally, it’s worth noting that the negative impact of criminalisation is not limited to the individual who is criminalised, but extends to their families and communities also. In this regard, it is instructive to note that CityWide⁸⁶ and the national Family Support Network⁸⁷ – respectively the representative voices of communities and families on the National Oversight Committee of the current National Drugs Strategy⁸⁸ are both in favour of adopting a decriminalised approach to possession for personal use.

82 Courts Service, *Courts Service Annual Report 2016* (Dublin: Courts Service), 63, [http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/300A-3D2A10D824E88025816800370ED2/\\$FILE/Courts%20Service%20Annual%20Report%202016.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/300A-3D2A10D824E88025816800370ED2/$FILE/Courts%20Service%20Annual%20Report%202016.pdf)

83 Health Research Board, Irish National Focal Point to the European Monitoring Centre for Drugs and Drug Addiction, *Focal Point Ireland: national report for 2017 – prison* (Dublin: Health Research Board, 2018), 8, <https://www.drugsandalcohol.ie/25265/1/NRPPrison2017.pdf>

84 Anne Clarke and Anne Eustace, *Review of drug and alcohol treatment services for adult offenders in prison and in the community* (Dublin: Probation Service and Irish Prison Service, 2016), 23, https://www.drugsandalcohol.ie/26569/1/PS_IPS_Probation_Review_of_treatment_for_offenders.pdf

85 See footnote 34, *supra*.

86 www.citywide.ie

87 www.fsn.ie

88 Department of Health, *Reducing Harm, Supporting Recovery – A health-led approach to drug and alcohol use in Ireland 2017–2025*, (Dublin: An Roinn Sláinte, 2017), 76, <https://health.gov.ie/wp-content/uploads/2017/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>



“I’VE BEEN CRIMINALISED FOR MY DRUG USE. IT DIDN’T HELP ME, AND I DON’T SEE HOW IT COULD BE HELPFUL TO ANYONE. PEOPLE WHO HAVE NEVER USED DRUGS TEND TO SEE DRUG USE AS BLACK AND WHITE, BUT THE REALITY IS A MILLION SHADES OF GREY. PEOPLE USE DRUGS FOR MANY REASONS. IF WE WANT TO HELP PEOPLE WHO ARE USING DRUGS, WE NEED TO HELP THEM UNDERSTAND AND ADDRESS THEIR OWN REASONS FOR USING, AS WELL AS SUPPORTING THEM IN OTHER AREAS OF THEIR LIFE WHICH MAY HAVE BEEN AFFECTED BY THEIR DRUG USE. TREATING THEM AS CRIMINALS – BRANDING THEM AS ‘OTHERS’ OR ‘LESS THAN’ – IS NOT A GOOD STARTING POINT FOR THIS. IT NEEDS TO STOP.”

TOM CUNNINGHAM

EVIDENCE

FROM DECRIMI-

NALISED

SYSTEMS

Given the obvious harms of criminalisation, and the extent of those harms, it is unsurprising that a number of countries have explored other routes. In this regard, a number of European countries have decriminalised minor drug possession with positive results, at least as measured by a number of health indicators. In this section, we look at the evidence from the experience of two other EU28 states – Portugal and Czech Republic.

PORTUGAL

STRUCTURE

The primary legislation in Portugal is Law 30/2000.⁸⁹ In essence, it creates a legal framework within which consuming, acquiring and possessing drugs is an administrative, rather than criminal offence (Article 2), and repeals the old provisions (Article 28). It also sets up the 'Commissions of Dissuasion' (CDT) (article 5 *et seq*) and sets out what they should advert to – namely,

the circumstances of the drug use and whether the person is 'addicted' or not (Article 10).

It will be noted that the aim is generally to help people. While fines can be levied under the law, this sanction is not available where the person is considered to be an addict (Article 15). There are a range of other civil limitations that can be utilised under Article 17.

In terms of practical application, when a person is found in possession of illicit drugs, the drugs are seized, and the police complete the relevant paperwork. However, instead of being brought before a court, the person is referred to a CDT – a multidisciplinary team who seek to assess and support the individual. The police notify the CDT, but it is the individual's responsibility to contact the CDT and re-schedule if they cannot make their appointment.

While the majority of the referrals come directly from the police, courts can also make a referral in circumstances where, for example, the person has been found in possession of drugs over the threshold, but in the court's view had the drugs for personal use and not for supply purposes.

The CDTs aim to inform, dissuade from use or motivate people to undergo treatment. After referral, the person will meet CDT panel members and spend 1–2 hours with them at a 'hearing' at which the CDT members will work with the person to identify an appropriate course of action to ensure or improve the health and wellbeing of that particular person. Participation in the CDT is not enforced through the criminal law, and CDTs cannot compel individuals to attend or comply with their

89 Defines the Legal Framework Applicable to the Consumption of Narcotics and Psychotropic Substances, together with the Medical and Social Welfare of the Consumers of such Substances without Medical Prescription, Law No. 30/2000, 29th November 2000, www.unodc.org/res/cld/document/prt/law30_html/portugal_law_30_2000.pdf

requirements. Despite this, both attendance and compliance rates are high.⁹⁰

EVIDENCE

In looking at the impact of Portugal's drug policy, a worthwhile caveat to keep in mind is that drug use is complex. Both proponents and detractors have been criticised for seeking soundbites to support their position – such an approach is often misrepresentative and unhelpful.⁹¹ In 2012, Hughes and Stevens compared two of the more exaggerated views on the Portuguese experience, noting that:

“...by outlining both accounts, and the choices that they made in presenting data, we found clear proof of misuse. Both showed selective use of evidence (focusing on different indicators, choice of years or datasets) and omission or a lack of acknowledgement of other pieces of the puzzle.”⁹²

It's also important to note that the specific legal change, the actual 'decriminalisation' component, was only one part of a much broader strategy – the National Strategy for

the Fight Against Drugs 1999–2004.⁹³ Given the complexities of drug use, a simple legal change, in and of itself, will not likely result in significant changes in population level measures related to drugs, such as prevalence of use.

Portugal's drug policy is not simply about decriminalisation – it is broader, an approach which '*places particular importance on humanism and emphasises that the individual with health problems has a right to treatment and should be considered to be in the centre of all decisions and of the public service actions*'.⁹⁴ In the Portuguese instance, the scaling up of health and social services for people who use drugs, including through savings from criminal justice costs, was an important component.

There are difficulties with assessing the impact of this approach from a causal perspective. Nonetheless, the available data are useful in identifying trends. Hughes and Stevens note that:

“..., it is not possible to state definitively that any trends observed since 2001 have been caused by decriminalisation or the broader strategy. Nevertheless, the statistical indicators and key informant interviews that we have reviewed suggest that, since 2001, the following changes have occurred:

- a. *Reductions in reported illicit drug use among the overall population.*
- b. *Increase in cannabis use in adolescents, in line with several other European countries.*

90 For a fuller discussion of the CDTs' operations, see Arianna Silvestri, *Gateways from Crime to Health – The Portuguese Drug Commissions*, <http://www.sicad.pt/BK/Dissuasao/Documents/AS%20report%20GATEWAYS%20FROM%20CRIME%20TO%20HEALTH.pdf>

91 See, for example, George Murkin, *Drug decriminalisation in Portugal: Setting the record straight* (UK: Transform Drug Policy Foundation, 2014), <http://www.tdpf.org.uk/resources/publications/drug-decriminalisation-portugal-setting-record-straight>

92 Caitlin Hughes, Alex Stevens, "A resounding success or a disastrous failure: Re-examining the interpretation of evidence on the Portuguese decriminalisation of illicit drugs," *Drug and Alcohol Review* (January 2012), 31, 101–113, 109

93 See Maria Moreira, Fátima Trigueiros and Carla Antunes, "The evaluation of the Portuguese drug policy 1999–2004: the process and the impact on the new policy," *Drugs and Alcohol Today*, (2007) Vol. 7 Issue: 2, 14–25, <https://doi.org/10.1108/17459265200700012>

94 Maria Moreira, Fátima Trigueiros and Carla Antunes, "The evaluation of the Portuguese drug policy 1999–2004: the process and the impact on the new policy," *Drugs and Alcohol Today*, (2007) Vol. 7 Issue: 2, 14–25, 16, <https://doi.org/10.1108/17459265200700012>

- c. *Reductions in problematic drug users.*
- d. *Reduced burden of drug offenders on the criminal justice system.*
- e. *Increased uptake of drug treatment.*
- f. *Reduction in drug-related deaths and infectious diseases.*
- g. *Increases in the amounts of drugs seized by the authorities.”⁹⁵*

There is also evidence to suggest that the Portuguese model is cost effective. One recent paper estimates that the social cost of drug use in Portugal reduced by 18% in the 11 years following the introduction of the new strategy.⁹⁶ From a criminal justice burden perspective, the UK Home Office’s work suggests that the burden can be reduced in the broader criminal system, but not necessarily on policing – this makes sense, given that police officers will likely be the first people to identify possession, regardless of the enforcement system in place.⁹⁷

As the evidence demonstrates the situation overall in Portugal is better than when the change in policy was introduced, notwithstanding the problematic nature of drawing causal relations. However, there is also one other point to note, and one for which causation can be established as it derives from the system itself. This is that people who use drugs are no longer criminals in Portugal. This is important

because language is important. As noted earlier, being a criminal is stigmatising – it affects how other people treat you, it affects your options in life, it affects how you perceive the world and your place in it. As societies, we should aim to avoid criminalising people unnecessarily – especially where, as in the case of criminalising drug possession, such a policy has no significant deterrent effect on the prohibited behaviour. Indeed, adopting a decriminalised approach can bring social benefits:

“Evidence from a number of countries [...] shows that decriminalisation can lead to improved social outcomes. For example, individuals who avoid a criminal record are less likely to drop out of school early, be sacked or to be denied a job. They are also less likely to have fights with their partners, family or friends or to be evicted from their accommodation as a result of their police encounter.”⁹⁸

95 Ricardo Gonçalves, Ana Lourenço and Sofia Nogueira da Silva, “A social cost perspective in the wake of the Portuguese strategy for the fight against drugs,” *International Journal of Drug Policy*, 26 (2015) 199–209, [https://www.ijdp.org/article/S0955-3959\(14\)00231-X/pdf](https://www.ijdp.org/article/S0955-3959(14)00231-X/pdf)

96 Ricardo Gonçalves, Ana Lourenço and Sofia Nogueira da Silva, “A social cost perspective in the wake of the Portuguese strategy for the fight against drugs,” *International Journal of Drug Policy*, 26 (2015) 199–209, [https://www.ijdp.org/article/S0955-3959\(14\)00231-X/pdf](https://www.ijdp.org/article/S0955-3959(14)00231-X/pdf)

97 UK Home Office, *Drugs: International Comparators* (London: Home Office, 2014), 51, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf

98 Caitlin Hughes, Alison Ritter, Jenny Chalmers, Kari Lancaster, Monica Barratt, and Vivienne Moxham-Hall, *Decriminalisation of drug use and possession in Australia – A briefing note*, (Sydney: Drug Policy Modelling Program, NDARC, UNSW Australia, 2016)

CZECH REPUBLIC

STRUCTURE

Under Czech Law, possession of small quantities of drugs for personal use is a non-criminal offence under the Act on Violations (Act No 200/1990). It is punishable by a fine of up to CZK 15 000 (EUR 555).⁹⁹ Threshold limits were formalised in law in 2010.

EVIDENCE

Though it has attracted somewhat less attention than Portugal, the Czech Republic provides an interesting case study as it has alternated between policy stances over the past few decades. The Czech Republic decriminalised minor drug offenses before Portugal – the drug law that was established soon after the end of the Soviet occupation in the late 1980s did not impose criminal penalties for minor offenses. However, the law became politically controversial as illicit drugs not previously seen entered the country through newly opened borders. As a result, minor possession was criminalised for a time, but the government wisely invested in an evaluation that concluded that criminal penalties did not deter new use or problematic use, thus disproving the promises of proponents of criminalisation.¹⁰⁰ As noted by the UK Home Office:

“In the Czech Republic, prior to decriminalisation, the previous stricter drug possession laws were subjected to rigorous evaluation.

*The evaluation found that following implementation of the stricter laws, there was no significant decline in the availability of drugs. This would further indicate that the levels of availability and use of drugs is driven by wider factors than the approach to possession alone.”*¹⁰¹

Minor possession was decriminalised again in 2010, this time with cut-off amounts for all drugs to define individual-level possession. Decriminalisation of minor offenses in the Czech Republic along with investment in syringe programs, treatment for drug dependence and other support services for people who use drugs helped result in averting HIV in this population as well as keeping hepatitis C prevalence among the lowest in Europe.¹⁰²

As with experiences elsewhere, it is worth reiterating the complexity of drug use and the policy choices which influence it; it is simple to pick data points, but more complex to be able to link those in a causative fashion to any single aspect of policy change. Nonetheless, it can be noted that, in the Czech Republic, as in Portugal, there are better health outcomes for people who use drugs under a decriminalised system. Per the Home Office:

“...the evaluation of the criminalisation of drug possession in the Czech Republic observed that adverse health outcomes for users increased following criminalisation. This finding informed a policy shift towards greater focus on treatment and public health responses,

99 “Czech Republic – Country Drug Report 2018,” Countries, Drug Reports, European Monitoring Centre for Drugs and Drug Addiction, http://www.emcdda.europa.eu/countries/drug-reports/2018/czech-republic/drug-laws-and-drug-law-offences_en

100 Joanne Csete, “A balancing act: Policymaking on illicit drugs in the Czech Republic” (New York: Open Society Foundations, 2012)

101 UK Home Office, *Drugs: International Comparators* (London: Home Office, 2014), 48, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf

102 Government of the Czech Republic, *Global AIDS response progress report 2014 (report to UNAIDS)*, (Czech Republic, 2015), http://www.unaids.org/sites/default/files/country/documents/CZE_narrative_report_2015.pdf

*although the evaluation acknowledged that the changes could not be attributed to the approach to possession alone.”*¹⁰³

Similarly, the Czech authorities place significant weight on the health-led nature of their approach and how this impacts on how the state interacts with people who use drugs:

*“Because drug use is not considered as an offence, the REITOX focal point believes that drug users are more confident to seek for help without feeling stigmatised and without worrying to be arrested. This liberal policy has impacted positively drug-related health issues and drug related crime violence in the country.”*¹⁰⁴

STRUCTURAL ISSUES IN DECRIMINALISED SYSTEMS

Generally, there are a number of structural issues policy makers should consider in designing a suitable system.¹⁰⁵ These include:

- a) Thresholds
- b) Penalties
- c) Decision makers

Each is briefly considered in turn.

THRESHOLDS

One important aspect of any system where possession for personal use is no longer dealt with as a crime is that of threshold quantities – in essence, ascertainable measures of drugs used ‘to distinguish between what is possession and what is supply or trafficking’.¹⁰⁶ It is, of course, possible to operate a system without thresholds, or with imprecise thresholds, but on balance it can be said that:

“This is an unhelpful approach. Threshold amounts can be useful as a guide for those responsible for determining the personal

103 UK Home Office, *Drugs: International Comparators* (London: Home Office, 2014), 49, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf

104 Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, *A review and assessment of EU drug policy*, (European Parliament, 2016), 79, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571400/IPOL_STU\(2016\)571400_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571400/IPOL_STU(2016)571400_EN.pdf)

105 For a fuller discussion see, for example, Niamh Eastwood, Edward Fox and Ari Rosmarin, *A quiet revolution: Drug decriminalisation across the globe* (2nd ed.), (London: Release, 2016), <https://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20-%20Decriminalisation%20Across%20the%20Globe.pdf>

106 Transnational Institute, *TNI-EMCDDA Expert Seminar on Threshold Quantities – Lisbon*, January 2011, 2, <https://www.tni.org/files/download/thresholds-expert-seminar.pdf>

*possession of drugs, but [...] should not be the sole determinative factor.”*¹⁰⁷

In considering what threshold quantities to set, one basic consideration is what unit to use – drugs can be measured in a number of different ways – by weight, by value, or by purity, for instance. All are by nature imprecise – weight does not speak to purity, and vice versa; and value is subject to market factors, for instance. It is perhaps for this reason that it has been noted that the main determinant of seriousness across the EU is *intention* rather than quantity of drugs,¹⁰⁸ and why it is important that thresholds are guidelines rather than rigid limits.¹⁰⁹ Beyond this basic issue, there are examples from across the globe which can inform on a practical level. For example, there is little point in setting thresholds which end up with more, not less, people being criminalised, especially considering that criminalisation will now be on the basis of the much more serious offence of supply.

Consider the situation in Mexico. In 2009, amendments were made to the country's laws in an effort to focus law enforcement priorities on combating traffickers and small-scale drug dealing. Mexico's 2009 *Ley de narcomenudeo* (Microtrafficking Law) both decriminalised minor possession and transferred authority for minor drug offenses from the federal to the

31 state governments.¹¹⁰ The Attorney General issued instructions not to prosecute individuals found in possession of less than 5 grams of cannabis, 0.5 grams of cocaine, 50 milligrams of heroin, or one ecstasy tablet, among other minimum quantities.¹¹¹ Below these amounts possession would not be considered a crime, though it might be an administrative offense subject to a fine. It was hoped that the law would both unclog the federal courts that were overwhelmed by drug cases and address the over-representation of minor drug offenders in prison. In reality, the cut-off points for establishing criminality of possession are so low that most possessions in real life are likely to be classified as something greater than “small-scale.”¹¹² A 2016 assessment found that 41% of people arrested for drug crimes were arrested for possession of less than 500 pesos or \$30 worth of drugs,¹¹³ exactly the result that the law attempted to change.

There are many such examples from around the world – in the Russian Federation, the definition of individual level possession has at times been based on such tiny quantities that virtually any real-life level of possession is a

107 Niamh Eastwood, Edward Fox and Ari Rosmarin, *A quiet revolution: Drug decriminalisation across the globe* (2nd ed.), (London: Release, 2016), 9, <https://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20-%20Decriminalisation%20Across%20the%20Globe.pdf>

108 Transnational Institute, *TNI-EMCDDA Expert Seminar on Threshold Quantities* – Lisbon, January 2011, 2, <https://www.tni.org/files/download/thresholds-expert-seminar.pdf>

109 In locations, like Ireland, where decision makers can be well trained, accountable and understanding of a health focus

110 Catalina Pérez Correa, “Drug law reform in Mexico,” *NACLA Report on the Americas* (2014), 47(2), 44–47.

111 Niamh Eastwood, Edward Fox and Ari Rosmarin, *A quiet revolution: Drug decriminalisation across the globe* (2nd ed.), (London: Release, 2016), 9, <https://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20-%20Decriminalisation%20Across%20the%20Globe.pdf>

112 Tim Mackey, Daniel Werb, Leo Beletsky, Gudelia Rangel, Jaime Arredondo and Steffanie Strathdee, “Mexico’s “ley de narcomenudeo” drug policy reform and the international drug control regime,” *Harm Reduct J* (2014), 11(1), 31, <https://doi.org/10.1186/1477-7517-11-31>

113 José Luis Pardo Veiras, “A decade of failure in the war on drugs”, *New York Times*, 9th October, 2016, <http://www.nytimes.com/2016/10/10/opinion/a-decade-of-failure-in-the-war-on-drugs.html>

criminal offense.¹¹⁴ In Poland, vague references to “small quantities” similarly made the attempt at decriminalisation relatively ineffective.¹¹⁵ In Brazil, the large-scale incarceration of minor drug offenders was contributing to significant overcrowding of prisons in the country in the early 2000s. A 2006 law was passed expressly to distinguish minor offenders from drug traffickers, decriminalise minor possession and help reduce the prison population. As it happened, however, the line distinguishing minor offenses from others was not well drawn, leaving it to courts to make their own determinations of this distinction. This had the unintended consequence of criminalising more people than had been the case under the previous regime – the law inadvertently resulted in the conviction and imprisonment of many more people for trafficking, including those with low-level infractions, than before the legislative change – by one estimate about 134,000 in 2012 compared to 60,000 in 2007.¹¹⁶ In 2016, Brazil’s Supreme Court ruled that trafficking convictions of first-time offenders who are not part of criminal organisations should be considered “non-heinous” offenses meriting lighter sentences than previously convicted traffickers.¹¹⁷

Ultimately, definitions of “individual” possession need to be based on the reality that at times

people who use drugs may have more than one “dose” in their possession to enable them to avoid daily or very frequent interactions with drug markets.¹¹⁸ The Czech cut-off points for most drugs, for example, are estimated to be about ten times a marketed individual dose to make such allowances. While clear and reality-based cut-off points are important, it is also critical to have flexibility in the system, and not to set it up for failure – the system needs to be able to account for circumstances where a cut-off threshold for possession may have been exceeded but there is still no intent to sell or supply drugs, or, contrarily, where the cut-off point has not been exceeded but the intent to supply is present. An example of this is present in Portugal, where people can be transferred between civil and criminal avenues if need be.

PENALTIES

A second structural consideration is that of penalties. Simply because something is not a criminal offence does not imply that doing it is without consequence. As with threshold limits, care must be taken in establishing what kind of consequences might flow from being in possession of drugs for personal use. There is little point in introducing a policy solution which is intended as a more humane and health led approach to dealing with drug use but, in implementation, ends up being as damaging as the system it is replacing. For example, consider Mexico again; in addition to the obvious issues with threshold levels, the Mexican law mandated that upon a person’s third “micro-trafficking” offense, he or she must be

114 See, Niamh Eastwood, Edward Fox and Ari Rosmarin, *A quiet revolution: Drug decriminalisation across the globe* (2nd ed.), (London: Release, 2016), <https://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20-%20Decriminalisation%20Across%20the%20Globe.pdf>

115 Ibid.

116 Paula Miraglia, *Drugs and drug trafficking in Brazil: trends and policies*, (Washington, DC: Brookings Institution, 2016), <https://www.brookings.edu/wp-content/uploads/2016/07/Miraglia-Brazil-final.pdf>

117 Conectas, “Supreme Court: Small-time trafficking is not a “heinous crime,” 28th June 2016, <http://www.conectas.org/en/news/supreme-court-small-time-trafficking-is-not-a-heinous-crime>

118 And, obviously, without any intent to sell the drugs in question

“diverted” to a treatment program or to jail.¹¹⁹
Per Eastwood et al:

“If caught with drugs under the threshold amount, individuals are supposed to receive only an encouragement to seek treatment; if caught three times with drugs under the threshold amount, treatment becomes mandatory. If the arresting authorities, in consultation with medical officials, determine that an individual uses drugs problematically, they can refer that individual to treatment on the first offence. And, if individuals refuse or fail to participate successfully in treatment, they are subject to criminal prosecution, as are those found in possession of drugs above the legal thresholds.”¹²⁰

One of the problems with this policy is that the primary consequence (mandatory treatment) is at best no more efficacious than voluntary treatment, while simultaneously raising serious ethical and human rights issues.¹²¹ The secondary consequence (criminality) is simply a return to the *status quo*, except this time either as a supplier or with the added stigma of being a

person who has ‘failed’ at treatment. The effects are both predictable and saddening:

“The law’s extremely low thresholds for possession offences leaves a large number of people vulnerable to prosecution for smallscale trafficking if caught with anything above these, despite them potentially having no intention beyond personal use. [...]”

From 2011 to 2013, the number of people imprisoned in federal penitentiaries for drug crimes grew by 19 per cent compared to just a 7 per cent overall rise in federal prison population during the same period. Furthermore, between 2009 and May 2013 140,860 people were arrested in Mexico for drug use, according to data from the Attorney General’s Office, and cases of possession and use still represent the majority – 65 per cent – of drug-related cases at the federal level,¹⁸⁴ though the annual figure has been declining in recent years.

Despite the fall at the federal level, statistics provided by 17 of Mexico’s 31 states plus the capital show the opposite at the local level; the number of open cases for drug-related crimes more than doubled from 2012 to 2014 from 9,518 to 22,234.”¹²²

Similarly, there is little point in setting ostensibly administrative sanctions like fines if the practical effect of that is that the state will end up expending resources to punish people who do not, possibly as a result of problematic drug use, have the capacity to pay the fines. If fines are considered as an option, net widening – the

119 Daniel Werb, Karla Wagner, Leo Beletsky, Patricia Gonzalez-Zuniga, Gudelia Rangel and Steffanie Strathdee, “Police bribery and access to methadone maintenance therapy within the context of drug policy reform in Tijuana, Mexico,” *Drug Alcohol Dependence*, (2015) 148, 221–225, <http://doi.org/10.1016/j.drugalcdep.2015.01.011>

120 Niamh Eastwood, Edward Fox and Ari Rosmarin, *A quiet revolution: Drug decriminalisation across the globe* (2nd ed.), (London: Release, 2016), 24, <https://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20-%20Decriminalisation%20Across%20the%20Globe.pdf>

121 See, for example, Daniel Werb, Adeeba Kamarulzaman, Meredith Meacham, Claudia Rafful, Benedikt Fischer, Steffanie Strathdee and Evan Wood, “The Effectiveness of Compulsory Drug Treatment: A Systematic Review” *International Journal of Drug Policy*, (2015) 28, 1–9. <http://doi.org/10.1016/j.drugpo.2015.12.005>

122 Niamh Eastwood, Edward Fox and Ari Rosmarin, *A quiet revolution: Drug decriminalisation across the globe* (2nd ed.), (London: Release, 2016), 25, <https://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20-%20Decriminalisation%20Across%20the%20Globe.pdf>

risk that the availability of an administrative sanction results in a higher level of detection and prosecution than would otherwise be the case, possibly because it is easier to enforce – must also be considered, particularly in circumstances where enforcement provides little benefit, serving only to further marginalise people where health and social supports would be more beneficial to both individual and state.

Ultimately, the goal of a decriminalised system should be support, not punishment. In many cases, this can mean that there is no sanction:

“The benefit of such an approach is the cost savings to the criminal justice system, in addition to the individual caught not having to undergo an unnecessary penalty. For example, large numbers of people in other jurisdictions who are subject to a civil fine for possession will agree to undertake a treatment programme in lieu of payment. Many of them do so simply to avoid payment and do not benefit from treatment since they do not use drugs problematically. It should be recognised that only a minority of people who use drugs (estimated at 10 to 15 per cent of all users) suffer from problematic drug-dependence and are in need of treatment.”¹²³

DECISION MAKERS

The third key structural issue is that of the decision maker. In essence, who decides whether a person is in possession for personal use or not? Realistically, it is the police who come into contact with people in possession of drugs and who have the relevant authority

to conduct searches and bring people before courts if necessary. Thus, the earliest stage at which a decision can be taken is typically that initial contact with the police. Delaying a decision beyond this point – for instance by demanding judicial or prosecutorial involvement – increases costs and complexity, as well as involving criminal justice interventions unnecessarily.

That said, systems do not have to be rigid and unyielding, and can be designed such that there is flexibility for switching between criminal and administrative systems as the individual case demands. Such an approach can provide flexibility in both directions – not only can it provide relief for the individual who has been caught with slightly more than the specified threshold limit for personal use, but it can also serve to aid enforcement of supply offences where a person who is clearly engaged in significant supply activities attempts to thwart the system by carrying amounts under the specified threshold limits. As an example, the Portuguese system permits referral from Commissions of Dissuasion to the Courts and *vice versa*.

Such systems require discretion on the part of the decision maker, similar to the systems that are already in place, both in Ireland and elsewhere. At present, there is no specific limit which a person must be in possession of in order to be charged with a supply offence; instead, it is implicitly recognised that strictly quantified limits can be problematic and a critical factor is the intent of the person in possession. As noted earlier, this is consistent with the position in many other European states:

“...to delimit personal use from supply and to gauge correct sentencing levels, there is a discretionary system, overseen by the judiciary and (for minor offences) also, by the police. In such a system the amount of a substance is not

123 Niamh Eastwood, Edward Fox and Ari Rosmarin, *A quiet revolution: Drug decriminalisation across the globe* (2nd ed.), (London: Release, 2016), 10, <https://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20-%20Decriminalisation%20Across%20the%20Globe.pdf>

seen as determinative on any level, but rather as one factor amongst many others and it is recognized that there are many factors which may result in someone being in possession of a higher quantity of drugs, without being involved in supply or trafficking, and none of which should result in the individual being punished as a trafficker; in this way the presumption of innocence and proportionality in sentencing are safeguarded. Examples of where someone may be in possession of a large amount of drugs for personal use include: bulk-buying to limit contact with the criminal market; use of drugs for medical purposes that make it difficult to access the market regularly; problematic drug use that has resulted in higher tolerance levels. [...]

*In general terms [...] the main determinant of seriousness across the EU is intention rather than quantity of drugs.*¹²⁴

A NOTE ON COST BENEFIT ANALYSIS

Cost-benefit analysis (CBA) is a method of economic analysis that measures the advantages and disadvantages of competing alternatives to determine which option will produce the greatest net value with the resources available. CBAs are traditionally used by businesses to make sound financial decisions, but the concept may be applied to social policy to help make evidence-based decisions. However, applying CBA to social policies pose a number of challenges.¹²⁵

In general, in order to conduct a quality CBA, three main requirements must be met. First, the policy outcomes must be measured in standard, quantifiable units of measurement to ensure valid comparisons are made. Second, there must be a sufficient amount of information to provide a complete analysis of the program outcomes. Lastly, each program analysed should be measured against a no decision counterfactual (i.e. the expected outcome with no policy implementation).

For complex social policies like decriminalisation, establishing a standard unit of measurement for social policy outcomes can be particularly challenging because it requires a consensus on the monetary value of intangible costs and benefits to society. CBAs also require a compre-

124 Transnational Institute, *TNI-EMCDDA Expert Seminar on Threshold Quantities – Lisbon, January 2011*, 2, <https://www.tni.org/files/download/thresholds-expert-seminar.pdf>

125 For a fuller discussion, see, for example, Aidan Vining and David L. Weimer, "An Assessment of Important Issues Concerning the Application of Benefit-Cost Analysis to Social Policy," *Journal of Benefit-Cost Analysis*, (2010), Vol. 1: Iss. 1, Article 6.

hensive assessment of possible outcomes, which can pose a challenge with social policies whose outcomes are difficult to predict. Similarly, CBAs used to make policy decisions must take future costs and benefits into account which brings an inherent level of uncertainty.

Given these challenges, it is perhaps unsurprising that there are few resources which are specifically on point in relation to CBAs and decriminalisation. One study which may be of use in considering a CBA framework which could be applied to the Irish experience is that conducted by Zábanský in the Czech Republic¹²⁶, which carried out a CBA in relation to a policy change whereby simple possession was criminalised, where this had previously not been the case. This study utilised previous work which had established the total costs to society related to illicit drug use. This was then analysed in the context of the change in policy and the consequences of that change. The study concluded that:

“In the short-term perspective [...] the implementation of penalization of possession of illegal drugs for personal use was economically disadvantageous and incurred redundant costs, that is, it caused the society to expend resources that could have been used in a different manner.”¹²⁷

And that:

“It is very likely that the implementation of penalization of possession of illicit drugs for personal use was very economically disadvantageous in the long-term perspective.”¹²⁸

126 See Tomas Zábanský, Viktor Mravčík, H. Gajdošíková, and Michal Miovský, *Impact Analysis Project of New Drugs Legislation in the Czech Republic* (Final Summary Report), (Prague, 2001), and in particular section 5/5 thereof.

127 Zábanský, Viktor Mravčík, H. Gajdošíková, and Michal Miovský, *Impact Analysis Project of New Drugs Legislation in the Czech Republic* (Final Summary Report), (Prague, 2001), 48

128 Zábanský, Viktor Mravčík, H. Gajdošíková, and Michal Miovský, *Impact Analysis Project of New Drugs Legislation in the Czech Republic* (Final Summary Report), (Prague, 2001), 48

4

A REPUBLIC OF
OPPORTUNITY

This paper has sought to set out, in clear terms, the best available evidence in relation to making policy in relation to possession of drugs for personal use as it pertains to Ireland in 2018. As noted in the introduction, it is hoped that the analysis herein will be of use to the working group and officials working on the implementation of the relevant action in the National Drugs Strategy, and can also help to engage the broader public in the discussion around health-led, person centred drug policy. In this closing section, a brief summary is given, in terms of conclusions and recommendations.

CONCLUSIONS

There are a number of conclusions which can be drawn from the current analysis. These are:

- a. A review of the policy landscape suggests that there is not now, and has never been, a significant appetite for punishing people who use drugs as a policy response. That this is the case can be illustrated with reference to international bodies, to the debates of legislators when the current regime was implemented, and to the current National Drugs Strategy.
- b. The evidence shows that there is little benefit in criminalising possession as a policy response. Doing so does not significantly deter drug use, reduce the prevalence of drug use, or provide other benefits. It does, however, stigmatise people who use drugs and limit their opportunities. Where bodies of legislators have considered the matter in detail, they strongly recommend abandoning this approach.
- c. Despite this, the available data indicates that under the current structure in Ireland, there is

significant criminalisation of simple possession in and of itself. This is evident from crime figures, court figures, and prison figures.

- d. The contention that implementing a decriminalised system will have a significant effect on broader trends such as prevalence¹²⁹ is not supported by the available research. However, evidence from other jurisdictions indicates that decriminalisation can, as part of a comprehensive policy approach, improve health and social outcomes for people who use drugs. Importantly, decriminalisation will, by definition, change the way people who use drugs are perceived in society. This, in and of itself, is of critical importance if an approach to drug use – health is not at the forefront if the people who require healthcare are, by definition, criminals first.
- e. Finally, the literature suggests that while decriminalised systems do not need to be complicated, they do tend to have certain characteristics, including:
 - i. Clear threshold limits, which are realistic and offer guidance rather than determination
 - ii. Appropriate responses, which do not result in more harm than had previously been the case
 - iii. Access to appropriate, person centred, needs based health and social services – which suit differing levels of need. As has been noted, not all drug use is problematic and any system of interventions should recognise this

¹²⁹ It should also be noted that lifetime prevalence figure for any illicit drug use in Ireland among 15–64 year olds was 26.4% in 2014/2015. See, National Advisory Council on Drugs and Alcohol, Prevalence of Drug Use and Gambling in Ireland and Drug Use in Northern Ireland, (Dublin: NACDA, 2016), 6. Insofar as drug use is an aberrant or abnormal behaviour, it is only marginally so.

RECOMMENDATIONS

With the foregoing in mind, the following is recommended:

- a. That Ireland decriminalise possession of small amounts of drugs for personal use. Continued criminalisation of people who use drugs is unsupportable by the best available evidence as a policy choice, and is in stark contradiction to a health-led policy for drug use.
- b. That, in designing such a policy, the focus is on pragmatic interventions which focus on health, and include the following:
 - i. Threshold limits which are reasonable, reflect the lived experience of people who use drugs and which serve as broad guidelines, not as inflexible standards. To protect against people attempting to thwart the system, intent should also be a key consideration for decision makers where people are in possession of small amounts
 - ii. Sanctions which are not punitive, but solely health based, supportive, voluntary and with as many opportunities afforded to the individual as needed. The sanctions chosen should recognise that not all drug use is problematic, and where possible, utilise existing structures and services, with defined pathways and interventions set in advance
 - iii. Decisions that are taken as close to the first point of contact as possible
 - iv. Training for health workers, educators, law enforcement and judiciary on the aims and implementation of the new system
- c. That any policy that is introduced be independently evaluated in terms of implementation and impact, and that adequate resources be made available for this purpose.

The authors of this paper are firmly of the view that the best available evidence shows that a policy of criminalising people for possession of small amounts of controlled substances for personal use does not provide any clear benefits, but does have significant social and other costs, such as the stigma and financial costs associated with prosecuting people who use drugs. As such, it is fundamentally inconsistent with a health-led approach to drug use, such as that espoused in the Irish National Drugs Strategy. Ireland is at a critical juncture regarding how we deal with drug use and, more importantly, how Irish society treats people who use drugs. How we decide to proceed as a country at this point will define how we are viewed in the future. If we are to truly have the Republic of Opportunity to which An Taoiseach refers in the foreword to the National Drugs Strategy, then we must ensure that our drugs policy is truly health-led, and not one where the default setting is to view people who use drugs through the lens of the criminal law.

THE AUTHORS

Marcus Keane is Head of Policy at the Ana Liffey Drug Project in Dublin. His work focuses on supporting the development and implementation of person-centred, evidence informed drug policy, such as supervised consumption sites, health based approaches to possession and accessible treatment. He also works on civil society involvement in drug policy formation and implementation and represents the Ana Liffey Drug Project on the Civil Society Forum on Drugs, an expert group to the European Commission. He is a non-practicing barrister and holds qualifications from Trinity College Dublin, University College Dublin, University College Cork and the Honorable Society of Kings Inns.

Joanne Csete is adjunct associate professor at the Columbia University Mailman School of Public Health in New York. She was previously the deputy director of the Global Drug Policy Programme at the Open Society Foundations. She was the founding director of the HIV Programme at Human Rights Watch in New York and worked on health programmes in sub-Saharan Africa for many years. She has published widely on drug control and human rights issues and holds degrees from Princeton University, Columbia University and Cornell University.

Dr John Collins is Executive Director of the International Drug Policy Unit (IDPU) at the London School of Economics (LSE), a Fellow of the LSE US Centre and a Distinguished Visiting Fellow of the Yale Centre for the Study of Globalization. He is Editor-in-Chief of the *Journal of Illicit Economies and Development*. He has served as Contributing Editor for a number of high profile reports on drug policy, including the LSE Expert Group on the Economics of Drug Policy 2016 Report, the 2014 LSE Blue Ribbon report *Ending the Drug Wars* and the 2012 LSE IDEAS Special

Report, *Governing the Global Drug Wars*. He has led a number of policy projects at IDPU, and his contemporary policy interests focus on the political economy of international drug control and the evolving dynamics on national and international policy reforms. He holds degrees from Trinity College Dublin and the London School of Economics.

Tony Duffin is Chief Executive Officer at the Ana Liffey Drug Project. Prior to this, he held a number of senior management roles in the addiction field, including playing a key role in opening Ireland's first emergency accommodation for young people who inject drugs and Ireland's first wet residential service for entrenched street drinkers. He is a leading advocate for progressive drug policy reform in Ireland, and holds qualifications from Kings College London, Trinity College Dublin, and the University of Bath.

ACKNOWLEDGEMENTS

The authors would like to recognise the contributions of a number of people and institutions to this report. Many thanks to Prof Catherine Comiskey, Lucy Dillon and Anna Quigley for reading drafts and providing valuable comments, suggestions, additional references and feedback. Thanks are also due to the staff and volunteers of the Ana Liffey Drug Project who helped with researching specific topics and producing early drafts – especially Theresa Milbrodt and Megan Korovich. To everyone who helped – many thanks. Your time and effort in contributing is much appreciated. Finally, many thanks to the Knowledge Exchange and Impact (KEI) Fund of the London School of Economics and the Global Drug Policy Programme of the Open Society Foundations for their support in carrying out this work.



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48 Middle Abbey Street
Dublin 1, D01TY74
01 878 6899, Freephone 1800 78 68 28
www.aldp.ie